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FEDERAL COMMUNICATIONS COMMISSION

RICHARD E. WILEY, Chairman
ROBERT E. LEE
CHARLOTTE T. REID
BENJAMIN L. HOOKS

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FCC 74R-108

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of AIRSIGNAL INTERNATIONAL, INC. For a Construction Permit To Establish New Facilities in the Domestic Public Land Mobile Radio Service at Memphis, Tenn.	Docket No. 19801 File No. 1970-C2-P-72
MAHAFFEY MESSAGE RELAY, INC. For a Construction Permit To Establish Additional Facilities for Station KRS 656 in the Domestic Public Land Mobile Radio Service at Memphis, Tenn.	Docket No. 19802 File No. 3443-C2-P-72

MEMORANDUM OPINION AND ORDER

(Adopted March 22, 1974; Released March 26, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. This proceeding involves the mutually exclusive applications of Airsignal International, Inc. (Airsignal), and Mahaffey Message Relay, Inc. (Mahaffey), for construction permits for facilities in the Domestic Public Land Mobile Radio Service at Memphis, Tennessee. Now before the Review Board is a motion to enlarge and revise issues, filed September 7, 1973, by Mahaffey,[1] and a motion to enlarge issues, filed on the same date by Airsignal.[2] [3]

A. BACKGROUND OF THE PROCEEDING

2. Airsignal and Mahaffey are currently licensed to provide one-way paging service to the Memphis area. Airsignal operates Station KIF 653 on 35.22 MHz, a "low band" frequency, while Mahaffey operates Station KRS 656 on 152.24 MHz, a "guard band" frequency. Both of these stations offer paging exclusively.[4] In addition, Mahaffey oper-

[1] Also before the Board are the following related pleadings: (a) opposition, filed October 4, 1973, by Airsignal; (b) reply, filed October 17, 1973, by Mahaffey.

[2] The Board also has before it these related pleadings: (a) opposition, filed October 4, 1973, by Mahaffey; (b) reply, filed October 17, 1973, by Airsignal; (c) supplement to motion, filed November 26, 1973, by Airsignal; (d) opposition to (c), filed December 4, 1973, by Mahaffey; and (e) reply to (d), filed December 14, 1973, by Airsignal. Airsignal's supplement contains new information relevant to the issues requested in its original motion, and is therefore acceptable for consideration.

[3] The Common Carrier Bureau, although a party to this proceeding, filed no response to either of these motions.

[4] Until recently, the only frequencies allocated "for use exclusively in providing a one-way signalling service" were 35.22, 35.58, 43.22 and 43.58 MHz, all on low band. In 1968, four more frequencies, 152.24, 152.84, 158.10 and 158.70 MHz (previously deemed unassignable because of interference problems—thus the name "guard band"), were made available for such use. Wireline and non-wireline common carriers were each permitted access to two of these frequencies.

104-032—74——1

ates Station KDT 223 in Memphis, and has construction permits for Stations KUC 870 in Collierville, and KUO 621 in Munford, Tennessee. These are high-band VHF stations which are licensed primarily for two-way general and dispatch communications but which may also provide one-way signaling service "on a secondary basis." Both Airsignal and Mahaffey have requested assignment of the frequency 158.70 MHz, which is the sole remaining guard band frequency available to non-wireline carriers in Memphis. In its application, Mahaffey claims that it needs additional facilities for Station KRS 656 because of the congestion, both existing and anticipated, on its currently assigned frequency, and because it has not proved "satisfactory" to provide both tone-only and tone-plus-voice paging modes [5] on the same channel. As a solution to the latter problem, it proposes to "deintermix" the two modes by placing each on a separate frequency. Mahaffey, pursuant to Section 21.516 of the Commission's Rules,[6] submits a traffic load study for Station KRS 656 but provides no data on its two-way stations in Memphis, Collierville, and Munford. Airsignal, in its application proposes to construct "a new one-way paging station," and makes no mention at all of its existing low band facility except to declare that "its experience in operating Station KIF 653 has reinforced [its] belief that additional one-way paging services are needed in the Memphis area." In this connection, in an amendment to its application, Airsignal contends that "a projected 681 subscribers" will use its proposed service.

3. The Commission's Memorandum Opinion and Order, FCC 73-858, 38 FR 22674, published August 23, 1973, which designated these applications for comparative hearing, captions Airsignal's application as one "to establish new facilities" and Mahaffey's as one "to establish additional facilities." It further declares that "since the Commission has found that tone-only paging is compatible with tone-plus-voice paging . . . there is a question of whether the traffic load study and other data submitted by Mahaffey, sans any consideration of mode incompatability, will support its request for an additional channel." The actual issues specified in the Order, however, are the usual standard comparative issues, and do not reflect this "question," nor do they distinguish in any other way between the two applicants.[7]

[5] Tone-only paging activates a small portable receiver which produces an audible tone (or, alternatively, a sub-audible vibration) which alerts a subscriber to respond in a prearranged manner. Tone-plus-voice paging allows the subscriber to receive a voice message in addition to the alerting signal.

[6] This section provides that "[a]n application requesting the assignment of an additional channel or channels at an existing Domestic Public Land Mobile radio station" shall include a showing of certain specified traffic loading data.

[7] The issues, as designated, read as follows:

1. To determine the nature and extent of services proposed by each applicant, including the rates, charges, personnel, practices, classifications, regulations, and facilities pertaining thereto.

2. To determine the total area and population to be served by Airsignal International, Inc. within the 43 dbu contour of its proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations and to determine the need for its proposed service in that area.

3. To determine the total area and population to be served by Mahaffey Message Relay, Inc. within the 43 dbu contour of its proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for the proposed service in that area.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the above-captioned applicants would better serve the public interest, convenience and necessity.

B. ISSUES REQUESTED BY MAHAFFEY

4. Among the issues requested by Mahaffey are the following:

To determine the present and prospective channel loading by each applicant of its currently assigned one-way paging frequency, and the adequacy of Airsignal's showing in this regard in light of Section 21.516 of the Commission's Rules.

To determine the past performance of each applicant in developing the respective existing one-way paging facilities which each is now authorized to operate in the Domestic Public Land Mobile Radio Service in Memphis, Tennessee.

To determine which of the applicants proposes the more efficient use of the requested frequency.

In support of its first request [8] Mahaffey contends that it is clear that both parties herein are applicants "for an additional channel . . . at an existing Domestic Public Land Mobile radio station" and are therefore required to submit traffic loading data as to their currently assigned one-way paging channels according to the provisions of Section 21.516 of the Commission's Rules.[9] Mahaffey alleges that, while it has fully met the requirements of this provision, Airsignal has not even attempted to comply; moreover, it complains, the Commission's designation Order, *supra*, ignores this "patent defect", and thereby "appears to impose different standards of proof of need on the two parties." According to Mahaffey, Airsignal would provide the same service if it received a grant that it does now (*i.e.*, one-way paging), and would do so from the same control point to the same customers in the same area—but would use two channels rather than one. Thus, Mahaffey declares, Section 21.516 applies to Airsignal as well as itself "according to any commonsense understanding of words." Mahaffey also claims that the

[8] At the same time it filed its motion to enlarge and revise issues, Mahaffey also filed a "petition to certify question to the Commission" with the Administrative Law Judge. Mahaffey made three requests of the Board in connection with this petition: (1) that we defer action on the motion before us until after the Judge's ruling on the matter before him; (2) that we grant Mahaffey fifteen days subsequent to that ruling in which to submit any necessary amendments to its motion; and (3) that, in considering the issues requested in the motion, we incorporate by reference the argument contained in the petition to certify. In an Order, released September 14, 1973 (FCC 73M–1047) the Judge denied that petition to certify; since then Mahaffey has made no attempt to supplement its motion to enlarge and revise issues. Its first and second requests have thus been rendered moot. Its third request, however, is still ripe, is unopposed, and will be granted. Accordingly, the argument summarized in paragraph 4 and notes 10 and 11 herein is actually that contained in Mahaffey's petition to certify.

[9] Section 21.516 of the Commission's Rules provides.

An application requesting the assignment of an additional channel or channels at an existing Domestic Public Land Mobile radio station (other than control, dispatch or repeater), in addition to the information required by other sections of the rules, shall include a showing of the following:

(a) The number of mobile units for which orders for service are being held.

(b) Data showing the actual traffic loading on each channel assignment of the present radio systems during the busiest 12-hour periods on 3 days (within a 7-day period) having normal message traffic not more than 60 days prior to the date of filing. This information should be reported separately for each of the 3 days selected, which should be identified by dates, and should disclose the following:

(1) The number of mobile units using the service during each of the days specified.

(2) The number of calls completed each hour.

(3) For systems that provide message relay service, (i) the number of calls held, (ii) the total holding time, and (iii) the maximum holding time for a call, due to busy radio circuit conditions during each hour; or, for systems that do not provide message relay service, the total number of minutes that the channel (base and mobile) was utilized for transmissions between the base station and land mobile units during each hour.

(4) For stations that provide one-way signaling as a primary service, (i) the number of mobile receivers in operation during the study period, (ii) the number of calls held, (iii) the total holding time; or for systems that do not provide a message relay service, (iv) the total number of minutes the channel is utilized for transmission between the base station and the mobile receiver during each hour.

(5) Such other additional information which may more accurately reflect channel loading, and any further information which may be applicable and pertinent to the application.

policy of spectrum management underlying Section 21.516 is "obviously relevant" here; the Commission should know, it urges, whether Airsignal is underutilizing its present frequency.[10] Mahaffey also alleges that, in its dealings with the Tennessee Public Service Commission, Airsignal treats its application as one for additional facilities in order to avoid a hearing at the state level which might otherwise be necessary pursuant to Section 21.15(c)(4) of the Commission's Rules and to the laws of Tennessee. Mahaffey declares that it would be "incongruous" to permit Airsignal to escape the requirements of one section of the Rules by claiming to apply for a new station, and at the same time to avoid the strictures of another section, and those of state law, by claiming to request additional facilities.

5. With regard to the second request, Mahaffey asserts that both it and Airsignal have provided one-way paging service in Memphis for two or more years, and that this affords a basis upon which the past performance of each can be evaluated. "It is of course axiomatic," it adds, that where there are competing applicants for radio facilities, "the past performance of each applicant in serving the public is a highly significant factor." In support of the comparative efficiency issue, Mahaffey simply refers the Board to the respective applications of Airsignal and itself, and submits an affidavit stating that its plan to place tone-only and tone-plus-voice operations on separate channels will "specifically enhance" the message carrying capacity of both frequencies.[11]

6. In its opposition, Airsignal contends that the Commission's designation Order does, quite properly, impose a greater burden upon Mahaffey, and accuses its rival of attempting under a "guise of equity" to lure the Board into placing these burdens on Airsignal as well. Airsignal maintains that guard band paging is a "technologically superior",[12] and, hence, a "unique and separate" class of DPLMRS service. Accordingly, it states, an applicant for an initial guard band frequency, such as itself, is always treated as "new" by the Commission and is not required to submit any information on low band services which it may already provide. By contrast, Airsignal declares, since Mahaffey is requesting a second guard band frequency, its channel loading and past performance are relevant to its application and are indeed, "already at issue." Airsignal also asserts that, when it entered the Memphis market, it took over an operation that, even for low band, had few subscribers and antiquated facilities, and further claims that its every effort to obtain Commission authorization to modernize this operation was opposed by Mahaffey, so that no improvements could be made until June, 1973. In these circumstances, it declares, Mahaffey's request

[10] Elsewhere in its petition Mahaffey charges, in effect, that this is indeed the case.

[11] In its petition to certify, Mahaffey protests that its desire to separate the modes is not the sole "basis" for its request for an additional channel, as the Commission's designation Order, in its view, implies. Mahaffey asserts that it filed its application because of the congestion on its existing paging channel and that it proposes deintermixture "simply [as] a method of achieving the most efficient use of the two channels."

[12] Airsignal alleges that the low band frequencies are inadequate for tone-plus-voice paging and have unsatisfactory propagation characteristics. In support of this, it cites the Commission's Memorandum Opinion and Notice of Proposed Rulemaking in re *Allocation of Frequencies in the 150.8–162 Mc/s Band*, 9 FCC 2d 659 (1967); *Mobile Radio Communications*, 29 FCC 2d 62, 21 RR 2d 921 (1971); and *Pattersonville Telephone Co.*, 34 FCC 2d 258, 23 RR 2d 1208 (1972), appeal docketed, No. 72–1715, D.C. Cir., July 28, 1973.

for comparative issues is unfair as well as contrary to Commission policy. Airsignal also contends, this time quoting directly from the designation Order, that Mahaffey's proposed deintermixture of modes is already at issue, and adds that, since Airsignal has no choice but to intermix, the efficiency issue requested by Mahaffey is "nonsensical." Airsignal promises, however, to demonstrate at the comparative hearing that its proposal will result in an efficient use of the requested frequency.

7. In reply, Mahaffey, pointing out the identical wording of the issues in the designation Order, derides the notion that the issues it now requests already lie against it but should not apply to Airsignal. It further contends that Airsignal would have the Commission "blind itself" to the merits of the two proposals and decide the case in a purely "mechanistic" fashion. A comparison of past performance would not be unfair, Mahaffey declares, since both applicants have been operating paging services in Memphis for about the same length of time. Moreover, according to Mahaffey, since Airsignal could deintermix, if it wished, by using low band for tone-only and guard band for tone-plus-voice, the efficiency question is still alive as to both parties and still "significant to the public interest." But most important, Mahaffey argues, there is nothing in the Rules or the case law to support Airsignal's claim that low and guard band paging are separate services; rather, the Commission, at most, distinguishes" between the propagation effects of the two bands—and even these differences have been minimized by recent improvements in low band equipment. Mahaffey contends that many low band paging systems, including some offering tone-plus-voice, operate successfully throughout the country, and further states that Airsignal's effort to improve its existing Memphis operations is itself a testament to the future of low band paging. In further support of its position, Mahaffey cites: a Notice of Proposed Rulemaking (FCC 71-1016, 38 FR 19916, published October 13, 1971), in which the Commission declared that radio common carriers "can and have provided valuable service to the public in the range 30–50 MHz which we feel should be continued and expanded;" *Radio Relay Corp.* v. *FCC*, 409 F. 2d 322, 15 RR 2d 2052 (1969), in which, it asserts, the 2nd Circuit found sufficient equivalence between the low and guard bands to conclude that low band operators did not need the protection of the "headstart doctrine";[13] and *FWS Radio, Inc.* 40 FCC 2d 680, 27 RR 2d 485 (1973), in which it claims, the Commission placed guard band frequencies on "parity" with other paging frequencies. Finally, Mahaffey asserts that in no other area of mobile radio service does the Commission treat low and high band operations as separate services merely because of frequency differences. For all these reasons, it urges, the Board should find that Airsignal is required to comply with the requirements of Section 21.516.

[13] "Headstart doctrine" was the name given to the Commission's policy of refusing to grant any guard band application in a given service area until all such applications could be disposed of. The purpose of this policy was to prevent unopposed applicants (usually wireline carriers) from receiving a competitive advantage because of hearing delays involving mutually exclusive applicants (usually non-wireline carriers).

8. Mahaffey also requests an issue:

To determine whether Airsignal is financially qualified to render the service it proposes.

Mahaffey objects to paragraph 3 of the instant designation Order, which states that Airsignal, "as a subsidiary of [Western Union International], is more than capable of meeting the $38,850 cost that would be incurred in carrying out its proposed constructions." Mahaffey asserts that there is in fact no assurance that Airsignal will have the resources of Western Union International at its disposal and charges that, in a similar proceeding in Dallas-Fort Worth, Texas, the Commission refused to accept the assets of Western Union International as those of Airsignal, and instead requested that Airsignal fully comply with Section 21.15(d) of the Rules. Noting that the balance sheet submitted by Airsignal in this proceeding shows its current liabilities to be about five times as large as its current assets, Mahaffey queries "how far Western Union International will go in backing up and bailing out Airsignal's various enterprises."

9. In opposition, Airsignal contends that Mahaffey's account of the Texas proceeding misrepresents the facts, and that the Commission there merely requested "boiler plate data relating to credit arrangements, financial agreements, and personal commitments of funds." Airsignal also claims that its financial strength and that of its parent are "well recognized" by the Commission, citing *Northern Mobile Telephone Company*, FCC 73–171, released February 16, 1973. In addition, Airsignal submits a letter from an executive vice president of Western Union International, guaranteeing full backing for the Memphis proposal, including additional capital as needed. Finally, Airsignal states that its own financial resources presently include over $200,000 in cash and over $1,000,000 in current assets, and that its operating revenues for the period of January–July, 1973, were in excess of $1,800,000.

10. Finally, Mahaffey requests an issue:

To determine whether Airsignal's failure to timely file its annual report of operations in the Domestic Public Land Mobile Radio Service, FCC Form L, constitutes a comparative demerit.

Mahaffey first notes that DPLMRS licensees are required to file annual reports not later than 90 days after the close of the calendar year, unless this deadline is extended by the Commission. It then alleges that Airsignal, "for no apparent reason", has not yet filed its report for 1972, and that this failure has not only hindered the evaluation of Airsignal's present application, but is "symptomatic" of its "lackadaisical approach" to DPLMRS requirements.

11. Airsignal, in response, asserts that Mahaffey's contentions are without justification and reflect inadequate research. Airsignal states that additional time for filing Form L reports is routinely requested and granted, and avers that it asked for such an extension in late March, 1973. "Shortly thereafter", according to Airsignal, its attorney was informed by a Commission staff member that a 90-day deadline had been waived and that Airsignal could take such additional time as was necessary to file its report. Airsignal submits the affidavit of one

of its attorneys in support of this account, and further states that the Form L report on its Memphis operation was ultimately filed on September 12, 1973.

C. ISSUES REQUESTED BY AIRSIGNAL

12. Airsignal, in its motion,[14] requests the following issues:

To determine the nature and extent of service now rendered by Mahaffey Message Relay, Inc., the capacity of its existing facilities, both in terms of its existing terminal equipment and modifications of its existing terminal equipment which could be made without Commission approval to expand such capacity, and in light of Section 21.516(b) of the Commission's Rules, or other pertinent regulations or Commission policy, whether the grant of Mahaffey's application for an additional guard band paging channel is justified in the public interest.

To determine whether grant of Mahaffey's application for the sole remaining guard band channel and the allocation to it of both paging frequencies at Memphis is justified in the public interest in light of the Commission's clear policy and precedent favoring competitive guard band service.

Airsignal calls the Board's attention to the Commission's designation Order in *Empire Communications Co.*, 31 FCC 2d 477 (1971), which contains an issue similar to its first requested issue. In that case, according to Airsignal, it was specifically found that Empire, an applicant for a second guard band channel, had failed to show sufficient traffic loading on its existing channel to warrant the assignment of another, and had also failed to prove that tone-only and tone-plus-voice paging are incompatible on the same frequency. In the instant designation Order, Airsignal maintains, the Commission made identical findings, and even cited the *Empire* precedent, but did not specify a separate issue. Airsignal suggests that this discontinuity is merely the result of an inadvertent error in framing the instant Order, and requests the Board to remedy this oversight. It also claims that the Commission overlooked still another similarity between Empire and Mahaffey, namely that both operate two-way stations having further "excess capacity" which could be used to provide paging on a secondary basis. Finally, Airsignal states that, in deciding whether to award an additional paging channel, the Commission should examine not only an applicant's present capacity for service, as was the case in *Empire*, but also its potential or "ultimate" capacity based on modifications to terminal equipment which could be made without Commission approval. Thus, the issue Airsignal proposes here is even broader than that ordered in *Empire*. In support of its second requested issue, Airsignal claims that the Commission has clearly held that public policy favors competitive guard band service. As a result, it continues, the Commission has on several past occasions allocated one guard band channel to each of two qualified applicants in an area on the theory that this will enable both to compete effectively and will provide the public with a proper choice of services.[15] Airsignal urges that Mahaffey should be required to show why, in the light of such public

[14] The arguments of the various supplementary pleadings are incorporated without special reference in the following discussion.

[15] In support of this, Airsignal cites *Mobile Radio Communications, supra*, and *Pattersonville Telephone Co., supra;* also, *ATS Mobile Telephone, Inc.*, 35 FCC 2d 443, 24 RR 2d 515 (1972).

policy and Commission precedent, it should be allocated both guard band channels in Memphis while Airsignal is relegated to the technically inferior low band frequency.

13. In opposition to Airsignal's first request, Mahaffey strenuously denies that its situation is identical to that of Empire Communications Co. According to Mahaffey, the Commission found Empire's showing under Section 21.516 "neither responsive nor adequate" and its existing channel capacity "sufficient to meet traffic needs for the reasonably forseeable future"; by contrast, it claims, the instant designation Order contains no findings at all, but merely states that there is a factual issue as to Mahaffey's traffic loading. Mahaffey also contends that there is nothing in the earlier case to indicate that the Commission took into account the capacity of Empire's two-way stations. On the contrary, it asserts, the Commission recognizes that it is not feasible to operate a reliable one-way service over frequencies on which two-way communications must always take priority, and thus does not require an applicant for one-way facilities to show, pursuant to Section 21.516, the traffic loading on its two-way channels. But in any event, Mahaffey declares, there is no excess capacity on its two-way stations, and Airsignal has submitted nothing to prove that such excess does exist, or, contingently, how any excess might be used.[16] Also, Airsignal's request for an inquiry as to "ultimate capacity" is unsupported by allegations of material fact as required by Section 1.229(c) of the Rules, according to Mahaffey. Moreover, it argues, such an inquiry would place upon it the "impossible burden" of "canvas[ing] the whole field of technology," and would contravene the Commission's "well established policy" against the consideration of hypothetical alternatives. With regard to the second of Airsignal's requested issues, Mahaffey merely argues that it is redundant with the conclusory issue already specified in the Commission's Order. If there are policy or legal considerations which favor one or the other applicant, Mahaffey maintains, the Commission obviously intends that they be introduced pursuant to this issue.

14. Airsignal, in reply, asserts that Mahaffey's opposition to both its requested issues is grounded in a "refus[al] to recognize" that, as an applicant for a second guard band channel, it has the burden of proving sufficient need for both channels to overcome the recognized public policy favoring competition. Airsignal further states that it is Mahaffey that has misread the *Empire* case, and that the Commission there did require Empire to demonstrate the capacity for paging on its two-way stations in addition to the traffic loading on its guard band channel. Moreover, according to Airsignal, two-way stations can and do provide reliable paging service, often in direct competition with carriers licensed solely for one-way operations. Finally, Airsignal contends that an inquiry as to Mahaffey's "ultimate capacity" would be neither impossible nor hypothetical, since the equipment and technology needed to expand guard band capacity is "well known and readily discernible."

[16] Two-way traffic on Station KDT 223 has been steadily increasing for several years, Mahaffey avers, and the Collierville and Munford stations are too far away from Memphis to provide it with any service whatsoever.

D. DISPOSITION

15. The Board believes that Airsignal, like Mahaffey, is required by Section 21.516 of the Rules to submit a traffic load study for its existing paging station, KIF 653.[17] This determination is based upon a close reading of Section 21.516 itself, which governs any applicant "for an additional channel at an existing Domestic Public Land Mobile radio station."[18] Section 21.1 of the Rules, in turn, defines "radio station" as "a separate transmitter or group of transmitters under simultaneous common control, including the accessory equipment required for carrying on a radio communication service." Airsignal's application indicates that its proposed facility will have the same transmitter location and control point as its existing facility, and that it will be operated, serviced and maintained by the same personnel. There can be little doubt, therefore, that the two will be "under simultaneous common control." Airsignal argues, however, that Section 21.516 does not apply to it because low and guard band paging are separate and distinct radio services. But there is nothing in the Rules to indicate any such dichotomy (by contrast, Section 21.504 does distinguish for some purposes between UHF and VHF two-way communications), nor does the case law support Airsignal's contention. It is true that the Commission, in its Memorandum Opinion and Notice of Proposed Rulemaking, *supra*, regarding the allocation of the guard band frequencies, discusses the "technical inferiority" of low band in terms of building penetration and long range skip interference. 9 FCC 2d at 663 (1967). But the Commission also notes therein the superiority of the low band in terms of area coverage. More important, that opinion, like the subsequent Report and Order on the same subject, 12 FCC 2d 841, 13 RR 2d 1508 (1968), consistently refers to "one-way signaling service" as a single entity. We hold, therefore, that responsibility for complying with the requirements of Section 21.516 of the Rules lies with both Airsignal and Mahaffey.

16. We also believe that Mahaffey should submit a traffic load study for its two-way station in Memphis, KDT 223.[19] Such a showing, in our view, is indicated by Section 21.501(d)(2) of the Rules, which states that an applicant for one-way facilities who already provides two-way service must give "full information" to show why paging could not be provided in connection with the base station facilities used for two-way communications. This subsection technically relates only to applicants for 135 MHz facilities. However, the showing which it requires is the kind which, in our view, should also be made in support of the use of 152 MHz facilities, especially in light of Section 21.516(b)(5), which requires applicants for additional facilities in any DPLMRS service to supply "such other additional information

[17] The fact that Airsignal's application was captioned as "new" in the designation *Order* is not dispositive. The caption employed, which was apparently adopted from Airsignal's self-description without reference to the question of need, cannot be regarded as an adequate substitute for the type of consideration the Commission views as essential. See *Fidelity Radio, Inc.*, 1 FCC 2d 661, 6 RR 2d 140 (1965).

[18] See note 9, *supra*.

[19] We will not require such data on Mahaffey's stations in Collierville and Munford, since there has been no indication that Memphis lies within the service area contour of either facility.

which may more accurately reflect channel loading, and any further information which may be applicable and pertinent to the application." Mahaffey overstates the case when it claims that the Commission has recognized the infeasibility of integrating one and two-way communications on the same frequency. In fact, the Commission's view is that such integration is "technologically possible," although it is impractical "where heavy requirements for both types of service must be satisfied." 9 FCC 2d at 661. Thus, it is the burden of the applicant to demonstrate that such integration is *not* feasible; we may not assume, or force the applicant's competitor to prove, that it is feasible.[20]

17. The Review Board will, however, deny Mahaffey's request for an issue concerning the past performance of each applicant. In *Arlington Telephone Co.*, 27 FCC 2d 1, —— RR 2d —— (1971), the Commission extended its policy regarding broadcasters' past performance to the DPLMRS field and required a threshold showing of unusual past performance by an applicant as a basis of inquiry. "A past record within the bounds of average performance will be disregarded," the Commission stated, "since average future performance is expected. We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future." So far in this proceeding, there has been no threshold showing like that contemplated in *Arlington Telephone*. However, should circumstances change in this regard, the Administrative Law Judge is authorized to permit the adduction of relevant evidence. The Board will also deny Mahaffey's request for an issue to determine which applicant proposes the more efficient use of the requested frequency [21] and Airsignal's request for an inquiry into the capacity of Mahaffey's existing facilities, since the respective allegations are inadequately supported and lack the requisite specificity called for by Section 1.229(c) of the Commission's Rules. In our view, these are requests for comparative engineering issues; hence should there be an appropriate threshold showing at some future time (*e.g.*, that either applicant has failed to develop the potential of its existing facilities or that an applicant's proposal reflects superior efficiency characteristics), the Presiding Judge is authorized to permit the adduction of relevant evidence. The Board will also deny Airsignal's request for an issue requiring Mahaffey to justify its application in light of the Commission's alleged preference for competitive guard band service. Such an issue would undermine the long established principle that each

[20] It is apparent that the Commission was neither fully nor accurately apprised of all information relevant to the question of need, *e.g.*, the Order stated that Mahaffey "is the licensee of one station in Memphis, operating in the DPLMRS. . . . Station KRS 656." In fact, as noted above (see paragraph 2, *supra*), Mahaffey is also the licensee of Station KDT 223 in Memphis. Thus, although some discussion was devoted to Mahaffey's traffic load study, this discussion cannot be regarded as sufficiently thorough.

[21] The designation Order in this proceeding makes it clear that the Commission has specifically considered and rejected the theory of mode incompatibility. The Board is therefore precluded from substituting its judgment in this matter for that of the Commission. See *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991 (1966). However, this is a significantly more narrow question than that of comparative efficiency.

DPLMRS applicant must demonstrate the need for its proposed service (not just its basic qualifications, as Airsignal contends) before competition becomes a relevant factor for consideration. See *Whitney Telephone Answering Service*, 1 FCC 2d 283, 6 RR 2d 47 (1965), reconsideration denied, 1 FCC 2d 1346, 6 RR 2d 496, review denied FCC 66–143, released February 16, 1966. Moreover, insofar as it contemplates a determination of policy, Airsignal's request is inappropriate. *Cf. Black Hills Video Corp.*, FCC 63–18, 24 RR 813 (1963); *North Shore Broadcasting Corp.* (*WESX*), 10 FCC 2d 163, 11 RR 2d 250 (1967).

18. The Board will also deny Mahaffey's request for a financial issue, since its objections have been fully met in Airsignal's opposition. The letter from the executive vice president of Western Union International dispels any doubt as to the intention of that company to support its subsidiary's Memphis proposal. Since the financial capacity of Western Union International itself is not in question, Airsignal's ability to readily acquire the $38,850 needed to carry out its proposal seems assured. Similarly, Airsignal has adequately explained the circumstances which led to its failure to timely file its 1972 Form L Report, and this explanation has been corroborated by a sworn statement. Moreover, the report itself has now been filed and is available to all parties. The Board therefore sees no reason to order a further inquiry in this regard.

19. Accordingly, IT IS ORDERED, That the motion to enlarge and revise issues, filed September 7, 1973, by Mahaffey Message Relay, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

20. IT IS FURTHER ORDERED, That the motion to enlarge issues, filed September 7, 1973, by Airsignal International, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects; and

21. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

To determine, in accordance with Section 21.516 of the Commission's Rules, the nature and extent of DPLMRS services now rendered in Memphis, Tennessee by each applicant.

22. IT IS FURTHER ORDERED, That each applicant shall have the burden of proceeding with the introduction of evidence, and the burden of proof, with respect to its own application.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-318

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Public Notice
CONCERNING SUSPENSION OF COMMISSION'S CABLE TELEVISION AND BROADCAST ANNUAL FEES

MARCH 29, 1974.

COMMISSION'S CABLE TELEVISION AND BROADCAST ANNUAL FEES SUSPENDED

On March 4, 1974, the Supreme Court handed down its decision in *National Cable Television Association, Inc.* v. *United States*, — U.S. —, 42 U.S.L.W. 4306, in which, after stating that it could not be sure that the Commission had used the correct standard in adopting an annual fee for cable television systems (see Section 1.1116(b) of the Commission's Rules and Regulations, 47 CFR § 1.1116(b)) under the Independent Offices Appropriations Act of 1952, 31 U.S.C. 483a, the Court directed that the case be remanded to the Commission for further proceedings consistent with the opinion.

In view of the substantial questions raised by the opinion of the Supreme Court, the Commission, by order of March 29, 1974, effective April 1, 1974, has suspended collection of the annual fees for cable television systems and broadcast stations pending revision of the schedule of fees. Annual fees for cable television systems for calendar year 1973, which become payable on April 1, 1974, and annual fees for broadcast stations which become payable on or after April 1, 1974, for the preceding twelve months, should not be submitted pending further action by the Commission. Cable television systems and broadcast stations which may have paid in advance an annual fee that would not have been payable until April 1, 1974 or thereafter will receive a refund of such fee upon a request with accompanying documentation. Any annual fees payable on or after April 1, 1974 that are submitted on or after that date will be returned. The appropriate annual fees for calendar year 1973 for cable systems and for the annual fee period for broadcast stations will be announced after further proceedings.

The Commission is considering what additional action, if any, is appropriate.

Action by the Commission March 29, 1974. Commissioners Wiley (Chairman), Lee, Reid, and Hooks.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMERICAN TELEPHONE AND TELEGRAPH CO.,
LONG LINES DEPARTMENT
Transmittal No. 11935; and Revisions of the Wide Area Telecommunications Service (WATS) Tariff F.C.C. No. 259 and Tariff F.C.C. No. 264

MEMORANDUM OPINION AND ORDER

(Adopted March 27, 1974; Released March 29, 1974)

BY: THE CHIEF, COMMON CARRIER BUREAU

1. We have before us a Petition For Rejection of tariff changes filed on behalf of MCI Telecommunications Corporation, Microwave Communications Inc., MCI New York West, Inc. and Interdata Communications, Inc. (MCI).

2. On January 15, 1974, the American Telephone and Telegraph Company (AT&T) filed revised tariff schedules under its Transmittal No. 11935 for its WATS service now scheduled to become effective April 1, 1974. AT&T is proposing substantive changes in its WATS rate structure. It has submitted cost and other data in support of these revisions in purported compliance with Section 61.38 of the Rules.

3. In its Petition For Rejection, MCI contends that nothing in the Section 61.38 material which AT&T has filed in support of the proposed tariff changes presents a defensible rate making basis for the substantial increased charges for full time and high volume users or for the even more substantial reductions in rates for the majority of WATS users. Moreover, MCI argues that AT&T's instant filing is violative of the Commission's decision, *In the Matter of American Telephone and Telegraph Company (WADS), Docket No. 14154, 35 F.C.C. 149 (1963)*.

4. In our opinion MCI's petition is completely lacking in merit and provides no grounds for rejection of these tariffs. It appears that MCI and others may be routinely filing petitions to reject tariffs concurrently with petitions to suspend and alleging the same grounds for both types of action. We believe, that it will be useful to summarize the grounds upon which the Commission may reject and return tariffs submitted to it for filing. These grounds are (1) failure to publish an effective date that meets the requirements of Section 203 of the Act or our rules thereunder; (2) lack of required authority to implement a proposed tariff offering (*Matter of Press Wireless, Inc.*, 25 F.C.C. 1466 (1958), *Matter of RCA Communicatons*, 34 F.C.C. 171 (1963), and *Western Telephone System, Inc.* F.C.C. 64–974, released

October 29, 1964); and (3) *prima facie* unlawfulness such as demonstrably in conflict with the Communications Act or a Commission rule, regulation or order. (*Associated Press* v. *F.C.C.* 448 F. 2d 1095 and *In the Matter of American Telephone and Telegraph Company* 487 F. 2d 865 at 880.)

5. Although not entirely clear, MCI's Petition For Rejection appears to be premised either upon the contention that the tariff revisions are unlawful on their face or that the carrier has not complied with Section 61.38 of our rules. Although we may agree that the tariff revisions raise questions of lawfulness that should be resolved by further investigation and hearing this is quite different from concluding that the tariffs are unlawful on their face so as to warrant summary rejection and return to the carrier.

6. MCI's reliance on the Commission's 1963 *WADS* decision is misplaced; the Commission issued no orders in *WADS* that govern the filing of *WATS* tariffs. Furthermore, Section 61.38 of our rules was not violated here merely because AT&T may have presented no defensible rate-making basis for the rate changes and may not be able to justify the changes at any further hearing or investigation. Our rules require the submission of the data, information and rate-making principles upon which the carrier relies for its proposal irrespective of whether such material is defensible. As we have heretofore stated, the purpose of Section 61.38 of our rules is ". . . to elict information and data which will facilitate the Commission's judgment as to whether such proposed tariffs present questions of lawfulness which warrant our investigation and hearing" (40 FCC 2d 149 at 153). In the present instance, AT&T's Section 61.38 showing suffices for an appropriate Commission disposition of this filing.

7. Accordingly, pursuant to Section 0.297 of the Commission's Rules, IT IS ORDERED That MCI's Petition For Rejection of Tariff Changes IS DENIED.

WALTER R. HINCHMAN,
Chief, Common Carrier Bureau.

FCC 74-286

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL For Renewal of License of Station WCFL, Chicago, Ill.	File No. BR-3735

MEMORANDUM OPINION AND REPORT TO THE COURT

(Adopted March 28, 1974; Released March 29, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it the above-captioned license renewal application on remand from the United States Court of Appeals for the District of Columbia Circuit.

2. On September 1, 1970, the Chicago Federation of Labor and Industrial Union Council tendered an application for renewal of its license for standard broadcast Station WCFL, Chicago, Illinois. However, Better Broadcasting Council, Inc., The Task Force for Community Broadcasting, and the Illinois Citizens Committee for Broadcasting timely filed a petition to deny that renewal application on November 2, 1970. Briefly, the petitioners alleged that substantial and material questions of fact existed with regard to the licensee's ascertainment of community problems, its proposed programming, and the station's commercial and program classification practices. The character qualifications of the licensee were also challenged by the petitioners.

3. After consideration of the matters set forth in the various pleadings, the Commission denied the aforenoted petition to deny and granted the WCFL license renewal application. *Chicago Federation of Labor and Industrial Union Council*, 38 FCC 2d 417, 25 RR 2d 1147 (1972). Petitioners appealed our action (Case No. 72-2235), filing their brief with the United States Court of Appeals for the District of Columbia Circuit on July 16, 1973. Upon a review of the brief and a subsequent re-examination of the record, it was determined that the Commission, due to an oversight, had failed to consider facts which have a bearing on some of the matters raised by petitioners. Therefore, on November 16, 1973, the Commission requested the Court to remand this case for the Commission's further consideration. On January 31, 1974, the Court granted the Commission's motion and denied the petitioners' countermotion for summary reversal.[1]

[1] In its Order the Court also directed the Commission "not to reopen the record, but to reconsider only the record as certified to this Court on January 30, 1973."

4. As noted by petitioners in their brief before the Court, the Commission by letter of October 30, 1970 requested the licensee to supply a brief description of three of the programs listed on the 1970 composite week logs (*i.e.*, *Jerry G. Bishop Show*, *Ron Riley Show*, and *Dick Williamson Show*) so as to enable the Commission to ascertain whether those programs were properly classified as public affairs programs. It was also pointed out in the letter that the licensee's listing of illustrative programs broadcast during the twelve months preceding the filing of the WCFL application contained programming whose classification as public affairs programs did not appear to be in accord with the Commission's program definitions.[2] The following programs were specifically noted by the Commission: *Ghost Show*, *Red Mottlow Baseball Show*, *Duke Ellington*, *Sports Special*, *Pop Goes the Music*, *Dick Biondi Labels the Blues*, *This is Elvis*, *Dick Biondi and Friend*, *Memphis Sunshines Again*, *In the Beginning*, and *Biondi Vietnam Show*.

5. In its response, dated November 9, 1970, the licensee claimed that the *Jerry G. Bishop Show*, the *Ron Riley Show* and the *Dick Williamson Show* utilized the same basic format, namely, telephone call-ins from listeners to express their opinions on matters of local, national and international interest or to otherwise comment upon a subject under discussion with a particular guest. In the licensee's opinion, these programs were properly classified as public affairs. It was further stated that *Dick Biondi and Friend* was a talk show in which the guest, a prominent music personality, discussed various matters of public concern and that the *Red Mottlow Baseball Show* was an award-winning, special documentary commemorating the 100th anniversary of baseball in the United States and featuring a discussion of the history, current status and future of baseball and interviews with baseball personalities. These programs were also claimed to fall within the Commission's definition of public affairs programming. However, the licensee acknowledged that eight of the remaining programs questioned in our October 30, 1970 letter probably should not have been classified as public affairs, and indicated a similar willingness to accept the Commission's determination that another program, *Ghost Show*, was also misclassified. No further description was furnished with respect to the *Duke Ellington* and *Sports Special* programs.

6. Originally, petitioners alleged that the licensee misrepresented Station WCFL's past programming by improperly classifying two musical programs, the *Dick Williamson Show* and the *Dick Biondi Show*,[3] as public affairs presentations. Based upon a review of the petitioners' pleadings and the licensee's description of the challenged programs which was set forth in its opposition pleading, the Commission held that while the *Dick Williamson Show* was properly classified, the other program (the *Dick Biondi Show*) should not have been classified as entirely public affairs. We further concluded that: "absent other

[2] Note 1(d) of Rule 73.112 defines public affairs programs as including "talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national and international public affairs."

[3] It appears that this program is the *Biondi Vietnam Show* referred to in our letter of October 30, 1970.

evidence, the mere fact that a licensee misclassified one or two programs does not compel the conclusion that the licensee is guilty of intentional wrongdoing" and that "There is no evidence which would support a conclusion of deliberate misrepresentation; nor is there any evidence which would establish a pattern of such misclassification." 38 FCC 2d at 424, 25 RR 2d at 1155. In reaching this latter conclusion, however, the Commission inadvertently omitted from its consideration the October 30, 1970 letter and the licensee's response thereto. The extent of the program misclassifications as reflected in the previously overlooked material, and the apparent absence of public affairs characteristics for several of those programs, compels the Commission to reverse its earlier determination. On the basis of the information before us, we find that a serious question is raised as to whether the licensee sought to misrepresent the extent of its public affairs programming.[4] The Commission is, therefore, unable to make the statutory finding that a grant of the license renewal application for Station WCFL is consistent with the public interest, convenience, and necessity, and is of the opinion that the foregoing matter should be explored in an evidentiary hearing.[5]

7. Accordingly, the General Counsel is instructed to transmit this Memorandum Opinion and Report to the United States Court of Appeals for the District of Columbia Circuit and to seek a remand of Case No. 72–2235 so that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned license renewal applications CAN BE DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(1) To determine whether, through the use of improper program classifications, the Chicago Federation of Labor and Industrial Union Council deliberately misrepresented Station WCFL's public affiairs programming and, if so, whether such conduct adversely reflects upon the qualifications of the Chicago Federation of Labor and Industrial Council to be a Commission licensee.

(2) To determine whether, in light of the evidence adduced pursuant to the foregoing issue, a grant of the application for renewal of license of Station WCFL would serve the public interest, convenience and necessity.

8. IT IS ALSO THE INTENTION OF THE COMMISSION, That the petition to deny, filed by Better Broadcasting Council, Inc., The Task Force for Community Broadcasting, and the Illinois Citizens Committee for Broadcasting, BE GRANTED to the extent indicated above;

9. That, Better Broadcasting Council, Inc., The Task Force for Community Broadcasting, and the Illinois Citizens Committee for Broadcasting be made parties to the hearing to be ordered;

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[4] In accord with the Court's directive, the Commission has limited its re-evaluation to the record as certified to the Court on January 30, 1973. See note 1, *supra*. Except to the extent indicated above, we reaffirm our earlier Memorandum Opinion and Order for the reasons stated therein.

[5] On August 31, 1973, the licensee timely submitted the WCFL renewal application covering the forthcoming triennial license term (December 1, 1973 through December 1, 1976). Proof of the licensee's compliance with the local publication requirements of Rule 1.580 was also tendered at that time. No petition to deny that application has been filed. While we could delay consideration of the 1973 renewal application until resolution of the issues specified herein, the Commission believes that the more appropriate procedure is to designate for hearing both renewal applications.

104–032—74 —2

10. That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence with respect to issue (1) will be on the parties respondent; and the burden of proceeding as to issue (2) and the burden of proof with respect to both issues herein will be upon the Chicago Federation of Labor and Industrial Union Council;

11. That, to avail themselves of the opportunity to be heard, the Chicago Federation of Labor and Industrial Union Council and the parties respondent, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of an Order designating this case for hearing, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in that Order; and

12. That, the Chicago Federation of Labor and Industrial Union Council shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such rules, and shall advise the Commission of the publication of such notice as required by Section 1.594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-316

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	File Nos.:
COMSAT GENERAL CORP.[1]	17-CSS-P-(3)-73, 130-CSG-P-73, 131-CSG-P-73.
ITT WORLD COMMUNICATIONS INC.	18-CSS-P-(3)-73, 141-CSG-P-73, 142-CSG-P-73.
RCA GLOBAL COMMUNICATIONS, INC.	19-CSS-P-(3) 73, 143-CSG-P-73, 144-CSG-P-73.
WESTERN UNION INTERNATIONAL, INC.	20-CSS-P-73, 145-CSG-P-73, 146-CSG-P-73.
Applications for Authority To Participate in the Construction and Operation of a Communications Satellite System To Provide Communications Services to the Department of the Navy and to Commercial Maritime Users	

MEMORANDUM OPINION AND ORDER

(Adopted March 29, 1974; Released April 1, 1974)

BY THE COMMISSION:

1. The Commission has before it an application filed by RCA Global Communications, Inc. (RCA) on December 21, 1973, requesting review of the decision of the Chief, Common Carrier Bureau, returning RCA's application for authority to construct and operate an earth station near San Francisco, California to be used in conjunction with the Navy/Maritime space segment to provide commercial communication service between the United States and ships at sea. In his letter of November 21, 1973, the Chief, Common Carrier Bureau, determined that the RCA application should be returned as being inconsistent with Section 1.747 of the Commission's Rules and Regulations and with the Commission's previous actions and policy decisions in this proceeding. Comsat General and Western Union International, Inc. (WUI) opposed RCA's application for review and RCA filed a response to those oppositions.

[1] The applications in this proceeding were originally filed by the Communications Satellite Corporation (Comsat). On February 22, 1974, the Commission issued an Order granting a petition to substitute Comsat General, a wholly-owned subsidiary of Comsat, as the party in interest on these applications.

BACKGROUND

2. On August 30, 1973, the Commission released a *Memorandum Opinion and Order* herein,[2] granting the applications of RCA, WUI and ITT World Communications Inc. (ITT) to participate with Comsat General in the ownership and operation of the Navy/Maritime satellite system. Accordingly, the Commission made ITT, WUI, and RCA parties to Comsat General's applications to construct the space and earth segments of the proposed Navy/Maritime system and included them in the partial waiver previously granted pursuant to Section 319(d) of a construction permit relating to the space segment of such system.[3] It also ordered the participants in the joint venture to meet promptly to seek agreement on the manner in which the consortium is to operate, reach decisions and implement such decisions, setting out certain guidelines for the agreement. The parties were directed to report back to the Commission on the agreement reached or on the progress of negotiations two weeks from the effective date of its decision. The parties were unable to reach full agreement, disagreeing on several fundamental questions. Consequently, the individual participants submitted for Commission consideration and resolution their respective views on the outstanding issues.

3. On September 10, 1973, at a time when the parties involved in the joint venture were holding their negotiating meetings, RCA tendered for filing with the Commission the application which is the subject of the application for review, seeking authority to construct and operate an earth station in California which would be one of two required for operation of the Navy/Maritime system and which would be operated by RCA on behalf of the joint venture.[4] Comsat General filed a petition to reject the RCA application, and RCA filed an opposition to that petition. By letter dated November 21, 1973, the Chief, Common Carrier Bureau, took the action returning RCA's application which RCA asks us to review. Specifically, the Chief, Common Carrier Bureau, found that, in view of the Commission's prior action making RCA a joint applicant on the Comsat General earth station applications, the filing by RCA of a competing application, at least insofar as serving maritime users other than the Navy, placed RCA in the position of being a party to two competing and thus inconsistent applications, contrary to Section 1.747 of the Commission's Rules and Regulations.[5] In addition, he held that RCA's application was contrary to the Commission's previous determination that the joint venture negotiations go forward on the basis of Comsat General's applications, so that competing applications were not contemplated. On December 21,

[2] 42 FCC 2d 533 (1973).

[3] *Memorandum Opinion and Order*, released April 16, 1973, 40 FCC 2d 496 (1973). This partial waiver was reinstated by Commission *Order*, released May 15, 1973.

[4] RCA indicated in its application that it would shortly file with the Commission another application for authority to construct and operate an east coast station to be used in conjunction with the Navy/Maritime system. RCA has not yet filed such an application.

[5] Section 1.747 of the Commission's Rules provides: "When an application is pending or undecided, no inconsistent or conflicting application filed by the same applicant, his successor or assignee, or on behalf or for the benefit of said applicant, his successor, or assignee, will be considered by the Commission."

1973, RCA filed its Application for Review of the Bureau Chief's decision.[6]

4. In its Application for Review, RCA claims that Section 1.747 of the Commission's Rules bars only inconsistent or conflicting applications of the same applicant, and that, in this instance, the applicants are not the same. RCA asserts that the law is clear RCA's minority (12.5 percent) interest in the joint applications for the Navy/Maritime earth stations would not, in and of itself, bar RCA from prosecuting a separate application of its own for alternate facilities, i.e., that the Commission has consistently held that applicants which are not either identical or under the control of the same party are not the same applicant with the meaning of Section 1.747.[7] RCA further contends that its application cannot be dismissed because of due process principles and the requirement of Section 309 of the Communications Act that a hearing be held before an application is denied. Moreover, RCA claims that, since its application and the joint application are only partially inconsistent, there is no technical reason why both earth stations could not be constructed, with its proposed station providing the commercial maritime communications capability and Comsat General's proposed station providing the requisite TT&C.[8] On the other hand, however, RCA claims that, if the Commission determines that the applications are mutually exclusive, the joint application could not be granted without a comparative hearing under the *Ashbacker* case.[9]

5. RCA also argues that its application is not inconsistent with the letter or spirit of the Commission's *Order*s in this proceeding and that it was error for the Chief, Common Carrier Bureau to return RCA's application on this basis. It contends that these *Orders* did not grant the requisite construction authority for the earth stations proposed in the joint applications nor specify the manner in which the Navy/Maritime earth stations could be constructed, owned, and operated for commercial maritime communications purposes. RCA claims that its application was specifically designed not to conflict with the joint applications insofar as the Navy service requirement was concerned, since the Commission had determined that there was a need for the early institution of such services.[10] In any event, RCA argues that, if its application conflicts with the joint application, it is only with regard to the provision of commercial maritime service, and that there is thus no basis for finding it inconsistent with the Commission's prior *Orders*.

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[6] RCA also resubmitted for filing the California earth station application with the request that it be held by the Commission pending a decision on the instant Application for Review.

[7] RCA, stating that this section has never been interpreted by the Commission in a common carrier proceeding, cites three broadcasting cases to support the contention that an application may not be dismissed or rejected because the applicant has a minority (noncontrolling) interest in another pending application for competing facilities. See *Jefferson Standard Broadcasting Co. et al.*, 33 FCC 471 (1962), aff'd. 344 F. 2d 582 (D.C. Cir. 1964); *Publix Television Corp.*, 18 R.R. 751 (1959); and *Mid-Island Radio, Inc.*, 4 R.R. 1432 (1949).

[8] RCA also contends that, if the return of its application is sustained, any meaningful consideration of an alternative earth station proposal will be precluded, and this would, in effect, result in an impermissible delegation of the Commission's responsibility to Comsat General by virtue of its 80.2 percent control over the joint application.

[9] *Ashbacker Radio Co.* v. *F.C.C.*, 32 U.S. 327 (1945).

[10] RCA claims that it made it clear that it did not object to a grant of the joint applications for TT&C purposes, even though it did indicate that it would be willing to furnish the TT&C services at its earth station if the Commission determined that to be desirable.

6. RCA contends, moreover, that a decision which required the abandonment of basic statutory rights to a hearing as a condition to joining the consortium would be highly questionable as a matter of law and policy since it would deprive a party of rights it would otherwise have to prosecute its own application for different facilities and would defeat the comparative hearing requirement of *Ashbacker*. At the very least, RCA assserts, an order which undertook to impose such a requirement must necessarily do so explicitly and unmistakably. RCA claims the Commission's *Orders* in this proceeding do not discuss this subject and contain nothing to support the Bureau's statement that the August 30, 1973 *Order* "did not contemplate the filing of a competing application." RCA claims that the statement in the August 30, 1973 *Order* that carriers would not be barred from bringing before the Commission alternative measures to those proposed by Comsat General would be meaningless if it were not possible to bring such matters to the Commission's attention in such a matter that action could be taken if determined to be in the public interest.

7. Lastly, RCA claims that no provision in the Commission's Rules specifically delegates to the Chief, Common Carrier Bureau, the authority to reject an application of this type in such a manner.

8. WUI opposes RCA's Application for Reveiw, asserting that the RCA application was correctly rejected, and that such application serves only to delay further the necessary resolution of the pending Navy/Maritime issues. WUI submits that RCA's contention that an application may not be rejected because the applicant has a minority (non-controlling) interest in another application for competing facilities is not supported by RCA's own citations. WUI asserts that RCA is the applicant on the first application, not merely a minority shareholder of the applicant, and thus there exists a sufficient identity of interest to require dismissal of the application. WUI, responding to the RCA claim that its filing of an application was the only means of obtaining meaningful consideration of alternative earth station proposals, points out that RCA's earth station proposal was never proposed or presented to the consortium as an alternative to the original Comsat General plan. WUI asserts that RCA must not be allowed, by such ill-timed action, to significantly alter the essential Comsat General application and related technical configurations upon which WUI predicted its proposed capital investment.

9. Comsat General opposes RCA's Application for Review, and supports the action of the Chief, Common Carrier Bureau. Comsat General initially distinguishes the cases relied upon by RCA on the same grounds as WUI. Moreover, Comsat General notes that RCA, having elected to be a joint applicant, does not stand in the same position as a minority investor of a single applicant.

10. Comsat General asserts that the two applications are in conflict with each other within the meaning of Section 1.747. The only way in which RCA's application can be viewed as other than mutually exclusive, *in toto*, Comsat General claims, is for the Commission to accept RCA's proposal for separating the TT&C earth station from the commercial communications earth station, thus, in effect, denying a significant and integral aspect of the joint application.

11. Comsat General further submits that to uphold RCA's position

would make a mockery of the joint participation policy adopted by the Commission and would preclude the early establishment of a single Navy/Maritime satellite system. It contends that when the Commission required Comsat General to amend its applications to permit each carrier to participate as an owner of the system, the carriers and Comsat General were placed in essentially the same position—each was given the opportunity to share in the ownership of the system or to decide not to participate in the program. To now accept RCA's argument that, in view of Section 309 and *Ashbacker*, it cannot be deprived of the right to have its competing application considered even though it elected to participate in the joint system and became a joint applicant on Comsat General's application would, it is argued, mean that all joint applicants would have the right to file competing applications and that the Commission would have to hold comparative hearings before any grant of authority. Comsat General submits that the Commission's joint participation policy cannot reasonably be interpreted to allow that result.

12. Comsat General points out that the Commission has consistently adopted policies to avoid just such comparative hearings in common carrier activities, particularly in the satellite field, either through multiple entry or through the mechanism of jointly-owned facilities. Comsat General cites the Commission's ownership policy with respect to earth station facilities for use with the INTELSAT system as an example of where, as in this instance, the interested parties were given an opportunity, or a right, to elect joint participation, thus assuring themselves of an ownership role in the facilities, or, in the alternative, the opportunity to contest the Commission's policy of favoring a joint system and prosecute competing applications, thus risking exclusion from facility ownership if they lost. In this proceeding, Comsat General argues that RCA and the other joint applicants were given the opportunity to take one course or the other, but not both. Moreover, it claims the opportunity to jointly participate was not granted by Section 309 or *Ashbacker*, and thus neither requirement can be applied here to yield the result advocated by RCA.

13. Comsat General, noting the Commission's statement that no carrier would be barred from raising questions about Comsat General's position with the Commission, claims that no factual basis exists for RCA's allegation that, unless it receives a Commission hearing on its separate competing application, it will necessarily be denied meaningful consideration of its proposal. Instead, Comsat General states, it would appear that RCA is rejecting the consequences of its election to become a joint participant and the framework for decision making and the resolution of differences that the Commission established, in favor of prosecuting its own interests outside the joint framework in a manner that would serve to frustrate the resolution of joint venture arrangements and implementation of the Navy/Maritime system.

14. RCA replied to the oppositions of WUI and Comsat General, asserting that neither opposition stated any legal grounds which would justify the Bureau's action. RCA further submits that the Commission should narrowly construe its Rules where to do otherwise would jeopardize the rights of parties.

15. RCA asserts that the cases it cited show that an application is

not subject to dismissal under Section 1.747 unless the same party has actual working control of, or a sufficient financial interest in, both applications. RCA claims, therefore, that its minority interest (12.5 percent) in the Comsat General-controlled applications would not, by itself, prevent it from filing a separate application for other facilities.[11]

16. RCA reiterated its argument that the August 30, 1973 decision afforded other parties besides Comsat General the right to bring to the Commission for decision alternative measures to those proposed by Comsat General, and that such relief would be meaningless unless the parties could file an appropriate application upon which action could be taken. RCA thus claims that there is no basis for finding that its application is contrary to the Commission's prior policy decisions. Moreover, it claims that any other view would preclude Commission consideration of alternative ground terminal facilities unless supported by Comsat General.[12] RCA asserts that it would be untenable to require RCA to pursue its earth station concept through the consortium, and that such a requirement, by virtue of Comsat General's 80.2 percent control over the joint application, would amount to an impermissable delegation of the Commission's statutory responsibility to pass on the merits of applications for new facilities.

DISCUSSION

17. As indicated above, the Chief, Common Carrier Bureau returned RCA's application to construct and operate an earth station in California in conjunction with the Navy/Maritime space segment as being inconsistent with Section 1.747 of the Commission's Rules and Regulations, which bars the filing of two inconsistent and competing applications, as well as being in conflict with the Commission's previous actions and policy decisions in this proceeding. We are of the view that the application was correctly returned for both of the reasons cited, and we are accordingly denying RCA's Application for Review and returning the application for construction permit which RCA has resubmitted.[13]

18. The RCA application was filed on September 10, 1973, after the Commission had made RCA, ITT and WUI parties to the previously filed Comsat General applications for both satellite and earth station construction permits. For purposes of Section 1.747, the key factor is that RCA and the other carriers were specifically made parties to the Comsat General applications. Thus, RCA was a joint applicant, as distinguished from a minority stockholder, in the Comsat General west coast earth station application at the time it filed its competing application.[14] We believe this plainly contravenes Section 1.747.

[11] RCA contends that, even if the Commission were to impose stricter standards in determining what constitutes a sufficient financial interest, RCA's interest in the joint applications, being restricted by Comsat General's voting power, would not qualify as such an interest.

[12] RCA here notes that Comsat General rejected any departure from the proposed system design, including earth terminals, at the meeting of parties on September 20, 1973 and in its statement of position to the Commission, dated October 5, 1973.

[13] Since the Commission has fully reviewed this entire matter and has determined that the application should be returned, we find no need to consider RCA's claim that the Chief, Common Carrier Bureau lacked authority to return the application.

[14] While RCA has indicated it would not object to Comsat General being authorized to construct and operate the TT&C facilities, its application is clearly in competition with Comsat General's application to which all parties were made joint applicants insofar as the non-TT&C facilities are concerned.

19. More importantly, we believe the RCA application runs counter to both the letter and the spirit of the Commission's prior actions and policy statements in this proceeding. We are not concerned here with an ordinary case of competing applicants proposing to provide a service. As spelled out in our *Memorandum Opinion and Order* of April 11, 1973, we were faced with a Comsat General proposal, designed primarily to meet urgent Navy requirements, but which also proposed limited capacity to serve commercial maritime users. The Commission concluded there would be significant public interest benefits in implementing the commercial aspect of the Comsat proposal. However, since this was a threshold undertaking, developmental in nature, and in order to avoid prejudicing future arrangements for providing maritime satellite communications services or favoring any potential applicant to provide such services, we determined that the proposal should go forward as a joint venture among Comsat and the carriers now engaged in high seas maritime communications service.[15] Accordingly, we required Comsat General to amend its applications—for both space and earth segments—to permit such other carriers to participate as joint applicants in the entire Navy/Maritime proposal.

20. In the Commission's Memorandum Opinion and Order of August 30, 1973, we, *inter alia*, granted the applications of ITT, WUI and RCA to participate in the Navy/Maritime system [16] and expressly stated that they "will be considered joint applicants before the Commission for construction authority for the space and earth segments." Moreover, that *Order* made plain our intention that the joint venture was to proceed on the basis of the applications, as amended, filed by Comsat General for the system. Thus, we provided that the pending "system applications" could be amended "if Comsat [General] agrees with the carriers that some aspect of the proposed system should be modified or changed." [17] Further, we distinguished the question of modifying or amending the applications on file from the right of each of the other carriers to raise questions about those applications or the positions taken by Comsat General.

21. In sum, we believe that, given the unique nature of the joint venture here involved and the determinations previously made by the Commission, applications in competition with the joint applications presently on file are unacceptable.

22. Accordingly, it is ORDERED that the Application for Review of the Chief, Common Carrier Bureau's action returning the RCA earth station application is DENIED, and that the application resubmitted by RCA be returned.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[15] We also made clear our determination to avoid any prejudice to the ongoing international efforts to reach decisions concerning the use of satellites to meet maritime communication needs.

[16] It is important to note that the Commission has stressed throughout that the proposal before it is for a Navy/Maritime "system" and not a series of independent proposals to be considered regarding parts of the "system", i.e., the Navy service portion, the ground segment, the space segment.

[17] We note, in this regard, that RCA did not submit its application to the other joint applicants although they were holding meetings at the very time the application was filed with the Commission.

FCC 74-317

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
COMSAT GENERAL CORP.
Concerning Authority To Construct
Earth Station Facilities

MARCH 29, 1974.

COMSAT GENERAL CORP.
950 L'Enfant Plaza SW.,
Washington, D.C.

Attention: Mr. John A. Johnson, President.

GENTLEMEN: This is in regard to your letter of March 15, 1974 in which you request the Commission to take prompt action on the pending applications of COMSAT General Corporation (Comsat General), ITT World Communications Inc. (ITT), RCA Global Communciations, Inc. (RCA) and Western Union International, Inc. (WUI) for authority to construct earth station facilities to be associated with the proposed maritime satellite communications system at Southbury, Connecticut (File Nos. 130, 141, 143 and 145-CSG-P-73 respectively) and at Santa Paula, California (File Nos. 131, 142, 144 and 146-CSG-P-73 respectively), or, in the alternative, to grant a waiver of construction permit pursuant to Section 319(d) of the Communications Act to permit the immediate commencement of construction of these facilities.

You point to the need to begin construction of these earth stations promptly in order to insure the timely availability of the earth segment of this system and avoid delay in the commencement of service to the United States Navy, scheduled for the end of 1974. In addition, you point to the cost penalty of approximately $160,000 that would be incurred by the joint applicants if an option in your contract with Philco-Ford for the construction of these earth station facilities is not exercised by March 29, 1974.

By letter dated March 26, 1974, RCA objects to Comsat General's waiver request on the grounds that a grant of this request would prejudice the resolution of outstanding questions regarding the ground segment associated with the proposed maritime satellite system, particularly with respect to consideration of the alternative earth station facilities proposed by RCA. It also alleges that Comsat General has not made an adequate showing that failure to exercise the March 29 option in the Philco-Ford contract would adversely affect the timely commencement of service to the United States Navy or the commencement of commercial maritime service, and that the cost penalty that would result from the failure to exercise this option is small com-

pared to other cost overruns already experienced. By letter of March 27, 1974, Comsat General replied to RCA's objections.

By Memorandum Opinion and Order adopted today, the Commission affirmed the earlier decision of the Chief, Common Carrier Bureau, to return RCA's application for authority to construct an earth station at Point Reyes, California to be associated with the proposed maritime satellite system, and the earth stations proposed in the applications referenced above therefore represent the earth segment to be employed by the joint applicants in this system. RCA is correct in its statement that the Commission is not presently in a position to issue the requisite construction permits for these facilities due to remaining unresolved policy questions regarding the proposed maritime satellite system and the need to clarify certain technical and operational parameters of the proposed earth station facilities. However, these matters are not of a nature that their resolution would be predetermined by a grant of the requested waiver, subject to the conditions we have set forth below. Moreover, action on this waiver request at this time would allow construction to proceed in a more orderly fashion with a greater degree of assurance that the earth segment needed in the provision of service to the United States Navy will be available in a timely manner, and would permit taking advantage of the cost savings available at this time. Therefore, it appears that the public interest would be served by the grant of a partial waiver of construction permit pursuant to Section 319(d) of the Communications Act, so that construction of the antenna and site facilities and r.f. equipment at Southbury and Santa Paula can begin at this time.

Accordingly, Comsat General, ITT, RCA and WUI are granted a partial waived of construction permit pursuant to Section 319(d) of the Communications Act to begin construction at their own risk of antenna and associated site facilities at Southbury, Connecticut and Santa Paula, California, including r.f. equipment, as described in the applications referenced above, subject to the following conditions:

(a) This action shall not constitute any determinations on the merits of the applications referenced above and does not in any manner prejudice the Commission's disposition of these applications or other unresolved questions regarding the proposed maritime satellite system;

(b) that this action covers only the antenna and site facilities and r.f. equipment to be constructed at Southbury and Santa Paula, and does not include any authority for channel derivation or other ground communications equipment; nor shall this action in any manner prejudge any determinations to be made as to the quantity or nature of the channel derivation and ground communications equipment to be installed at these earth stations;

(c) this action is not to be construed as an approval of the technical characteristics of these earth station facilities;

(d) that this action is not to be construed as an approval of the $5,425,000 estimated investment cost in these facilities presented in Comsat General's letter of February 1, 1974; and Comsat General shall provide on behalf of the joint applicants, within 15 days of this action, a detailed breakdown of the estimated ground segment investment costs at each site for the provision of service to the United States Navy and for the provision of commercial maritime service, as well as estimated annual operating costs and revenue requirements, including the specification of those costs directly attributable to each of these services, the costs allocated to each of these services which are common to both, and the costs allocated to each of these services which are common both to these maritime

services and to the domestic satellite services proposed by Comsat General or CML Satellite Corporation at Southbury and at Santa Paula, and the methodologies employed in the allocation of these common costs; and

(e) in the event that the application referenced above is not granted by the Commission, related procurement and construction costs shall not be included in any rate base of Comsat General, ITT, RCA or WUI, or charged to expenses for rate purposes, but shall be charged by each against surplus.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
C & P TELEPHONE CO.
For Confidentiality of Letter Sent to the FCC

MARCH 18, 1974.

Mr. FRANK M. STEADMAN, Jr.,
C & P Telephone Co.,
1710 H Street NW.,
Washington, D.C.

DEAR MR. STEADMAN: This is in response to your letter of September 5, 1973 requesting that the Commission maintain upon a confidential basis a letter from the Deputy Director of the United States Secret Service which is dated August 21, 1973 and which is concerned with the use of recording devices in connection with communication services furnished to the White House. You indicate that your company was not authorized to make this letter available to anyone other than the Federal Communications Commission.

As you know, on August 2, 1973 by "Notice of Complaint" the Commission notified the Chesapeake and Potomac Telephone Company and American Telephone and Telegraph Company that Mr. Robert E. McCann had filed a formal complaint under Section 203 of the Communications Act in which he alleged that a telephone call he had made to the White House on October 29, 1972 had been recorded without the beep tone required under applicable tariff requirements. His complaint is a matter of public record as is the "answer" the carriers filed in response with the Commission on August 31, 1973.

It is noted that the carriers' response makes specific reference to the advice contained in the letter from the Secret Service and that they appear to be relying at least in part upon the position asserted by the Secret Service that its statutory responsibilities take priority over the existing tariff requirements. Answer, paragraphs 8 and 9.

In view of this it seems clear that the Commission would necessarily consider the letter from the Secret Service in its resolution of this matter. Moreover, it should be noted that a non-public document may lose its protected status if it becomes the basis for an agency decision. *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935. 939 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696, 699 (D.C. Cir. 1969). Further, it seems evident that the carriers' explicit reference to the position of the Secret Service in their reply pleading has opened the door to discovery by the complainant in this matter.

For the foregoing reasons, as explained above, we are therefore, unable to grant your request for confidential treatment of this letter. In addition, because the letter was furnished in response to a request from the Commission, our rules do not permit it to be returned to you without consideration by the Commission (47 CFR § 0.459(c)).

It has been ascertained, however, that the Secret Service would not object to disclosure except for the paragraph about its investigatory techniques described in paragraph four of the letter. On the basis of this assurance, this paragraph will be deleted in the letter before it is placed in the public docket file.

Sincerely yours,

JOHN M. TORBET,
Executive Director.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA, INC.
Concerning Fairness Doctrine Against
NBC, Licensee of Station WRC–TV,
WASHINGTON, D.C.

MARCH 27, 1974.

ACCURACY IN MEDIA INC.,
1232 Pennsylvania Building,
425 13th Street NW.,
Washington, D.C.

GENTLEMEN: This is in reference to your fairness doctrine complaint against the National Broadcasting Company, licensee of Station WRC–TV, Washington, D.C., concerning its February 19, 1972 and August 5, 1972 broadcasts of an interview of Black Panther Party leader Bobby Seale on the "David Eaton Show".

Your initial letter to the Commission, dated August 28, 1972, stated that in the interview "Seale presented a picture of the Black Panther party, its philosophy and activities that was very one sided . . .," that the ". . . Black Panthers are a highly controversial group [since] they have been criticized by the highest law enforcement officials of the land for their encouragement of violent and lawless conduct. . .." and that therefore ". . . the nature of this group is a controversial issue of public importance." You also stated that you had written to WRC–TV ". . . to inquire what other programs WRC had presented on the Black Panthers that would balance the one-sided presentation . . .," and that you had received no response.

The Commission advised you by letter dated October 3, 1972 that WRC–TV had informed the Commission that it had responded to your letter and would reply to you further with regard to your inquiry, and that, pending receipt of such further information from you, no formal action would be taken.

In its response to your inquiry, dated October 27, 1972 (a copy of which you forwarded to the Commission on January 15, 1973), WRC–TV stated that the interview in question ". . . constituted an information survey or discussion, from Mr. Seale's viewpoint, of the social conditions facing Blacks and other minority groups and the efforts which should be undertaken to modify these conditions . . .," and that the program also presented ". . . Mr. Seale's views of the programs and objectives of other Black social action and civil rights groups, as well as his views on the programs and objectives of other members and leaders of the Black Panther Party." The station also stated that it did not regard ". . . the presentation of Mr. Seale's views on these

matters as obligating us to 'give someone else equal time to discuss Seale and his organization,' as you request . . . "; and that "[t]he appearance of an individual, whether on his own behalf or as a representative of some group or organization, to state his views on matters does not give rise to an obligation to present someone else to state antagonistic views concerning the individuals or his organization." Citing numerous network and local programs as representative of its ". . . on-going effort to present a broad range of views on the problems, concerns, desires and life styles of Black and other minority segments of our population . . .," WRC–TV concluded that ". . . the David Eaton Show of August 5, 1972 constitutes but one small part of the general programming designed by the station to inform and educate the viewers concerning this area of special interest . . .," and that the ". . . scheduling of such diverse and varied programming addressing the problems of Blacks and minorities assures that numerous representative and authoritative viewpoints are presented from a broad spectrum of thought and opinion on the subject."

On November 2, 1972, the Commission received a copy of your reply letter to WRC–TV, dated October 31, 1972, which reiterated your claim that the "David Eaton Show" interview presented ". . . the history, the philosophy and the activity of the Black Panther Party as explained by Bobby Seale." In particular, you cited several statements in the interview which you claim set forth Black Panther philosophy, views, and objectives, and which, you contended, ". . . involve a one-sided presentation of issues of public importance." You further asserted that WRC–TV had a ". . . fairness doctrine obligation to present to the audience that listens to the David Eaton Show a different view of the Panther philosophy and activities than the self-serving portrayal provided by Bobby Seale." You concluded by requesting the station to give Mr. Eaton's audience ". . . an opportunity to hear a knowledgeable critic of the Black Panthers." In support of your contentions, you submitted four pages of what appeared to be a partial transcript of the interview in question.

On January 18, 1973, the Commission received a copy of WRC–TV's further response to you in which the station disputed your contention that the discussion during the interview, insofar as it touched on the Black Panther Party itself, dealt with a controversial issue of public importance. WRC–TV asserted that it does not ". . . regard the Black Panther Party, its existence, membership, policies, past history, future plans, leadership, etc. at this point in time as a controversial issue of public importance to viewers served by WRC–TV . . ."; and that, ". . . of the various past events involving the Party and its members discussed in the program, none can be classified as current." The station further claimed that ". . . an analysis of the programming carried on WRC–TV reveals that substantially all individual sub-issues discussed during the Eaton-Seale interview were fully explored at other times by other individuals in our over-all programming efforts." The licensee's response also grouped the statements cited by you in your letter of October 31, 1972 into four categories: alleged oppression of Black and other minority groups, police relations, need for radical social change, and means for organizing to accomplish social change.

The response then presented an extensive listing of individuals who had appeared on WRC–TV to discuss, from contrasting points of view, the topics covered by the Seale interview. In conclusion, the station stated that ". . . it is clear that our audience has not been left uninformed concerning various shades of opinion related to the discussion by Bobby Seale on the Eaton Show.

After reviewing the licensee's response to your complaint, the Commission sent a letter to the licensee, on January 18, 1973, requesting its comments on your complaint in light of the fairness doctrine. In a February 14, 1973 response, NBC urged that your complaint be dismissed, since you ". . . failed to define the specific controversial issues [which you claim] are involved . . .;" failed to show ". . . that the matters discussed were controversial . . .;" failed to identify " . . . the contrasting points of view that WRC–TV has allegedly ignored . . .," and failed to ". . . show affirmatively that WRC–TV has failed to provide programming to inform the public of contrasting views." NBC contended that the program in question did not involve controversial issues of public importance:

> This interview merely presented an informative survey by Mr. Seale of the social conditions facing Blacks and other minority groups and efforts which have been undertaken by his organization to modify those conditions. While the discussion touched on the Black Panther Party, its existence, membership, policies, past history, future plans, leadership, and the like, WRC–TV does not believe either that they were the basic issue with which the program dealt or that these subjects at this point in time constitute controversial matters of public importance.

The licensee's final contentions were that, "[i]n any event, WRC–TV has informed the public of other points of view concerning the Black Panthers . . .," and that ". . . NBC believes that it has presented a broad diversity of views on the matters discussed in the Eaton program." In support of these contentions, the licensee cited a number of network news items, broadcast by WRC–TV, which dealt with events in which the Black Panthers were involved.

In your February 19, 1973, reply to WRC–TV's response, you reiterated your contention that the ". . . Black Panthers' philosophy and activities are highly controversial and that it is important that the public be informed of more than the single point of view of the Panthers that was presented by Seale and Eaton." You further asserted that you ". . . seek an opportunity for knowledgeable persons who are critical of the Panthers to state their case." In reference to the list of network news items broadcast by WRC–TV which dealt with events involving Black Panthers—the list contained in the licensee's February 14 response—you contend the following:

> There is not a single program in the NBC list that can be said to provide the WRC audience with any kind of systematic discussion of Panther philosophy, history and activities of the type that would provide balance for the Seale interview on the Eaton show.

The initial question presented by your complaint is whether the Eaton-Seale interview presented the discussion of one side of a controversial issue of public importance and thereby obligated NBC, under the fairness doctrine, to afford reasonable opportunity for the

104-032—74——3

broadcast of contrasting views. As has been frequently observed, "[t]o invoke the fairness doctrine . . . there must exist a controversial issue of public importance on which the licensee has refused to allow a reasonable balanced point of view." *Green* v. *FCC*, 447 F. 2d 323, 327 (D.C. Cir. 1971), *quoted with approval in Healey* v. *FCC*, 460 F. 2d 917 (D.C. Cir. 1972). The Commission has long held, in this regard, that it is both the responsibility and within the discretion of the broadcast licensee or network to determine whether a controversial issue of public importance has been presented in its programming, and that the burden is on the complainant to establish that the licensee or network's judgment in such matters was unreasonable or in bad faith. *See In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964); *Report on Editorializing*, 13 FCC 1246 (1949). As the Commission has stated:

> The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. 13 FCC at 1251.

Generally, the Commission will review a licensee's decisions pursuant to the fairness doctrine only to determine whether the licensee has acted reasonably and in good faith under all the facts and circumstances presented.

With these principles in mind, the specific issue on the facts presented is the reasonableness of NBC's judgment that the Black Panthers are not, in and of themselves, a controversial issue of public importance within the meaning of the fairness doctrine.

It first should be noted that the fairness doctrine is issue oriented. It is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. In this regard we do not believe that the mere appearance by a controversial person or group on a station or network constitutes the presentation of one side of a "controversial issue of public importance," thereby obligating the station to give someone else the opportunity to, in essence, attack or criticize that person or group. Such an *ad hominem* application of the fairness doctrine would not appear to be conducive to "robust and wide-open" debate on the substantive social, political, economic, and other public *issues* in American society. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). See also *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973).

In *Healey* v. *FCC*, *supra*, the Court of Appeals also rejected a "person-oriented" approach to the fairness doctrine. In commenting on appellant's claim that she herself was the controversial issue of public importance involved, the Court stated:

> To characterize every dispute of this character as calling for a rejoinder under the fairness doctrine would so inhibit television and radio as to destroy a good

part of their usefulness. It would make what has already been criticized as a bland product disseminated by an uncourageous media even more innocuous . . . It would in every way inhibit that "robust public debate" that the fairness doctrine was borne to enhance. *Id.* at 922–3.

Somewhat analogously, the Commission has ruled that, in an election for public office, each individual candidate cannot be considered a separate controversial issue of public importance solely by reason of his candidacy or partisan campaign. *Dr. Benjamin Spock et al.*, 44 FCC 2d 12, 18 (1973).

It would thus appear that NBC's judgment that an appearance by a member of the Black Panthers, in and of itself, does not constitute the presentation of a viewpoint on a controversial *issue* of public importance was reasonable. It further appears that several of the remarks made by Mr. Seale during the course of the interview here in question did present the Black Panthers' views on several inter-related issues concerning the problems facing Blacks and other minority groups in American society. However, it also appears, from the programming cited in WRC–TV's January 15, 1973 response, and you have made no showing to the contrary, that the station has afforded a reasonable opportunity for the presentation of contrasting views on these issues in its overall programming. See *Allen C. Phelps*, 21 FCC 2d 12 (1969). As the Court of Appeals stated in *Healey:*

On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this issue . . . The essential element in invoking the fairness doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. *Id.* at 921.

Accordingly, it does not appear, on the basis of information presently before the Commission, that WRC–TV has failed on an overall basis to afford reasonable opportunities for the presentation of conflicting views regarding the substantive issues raised in the Eaton-Seale interview.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the compaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
GERALD C. BECKWITH
Concerning Fairness Doctrine Involving
Station WJIM–TV, Lansing, Mich.

APRIL 2, 1974.

GROSS TELECASTING INC.,
Licensee of Station WJIM–TV,
2820 E. Saginaw,
Lansing, Mich.

GENTLEMEN: This is in reference to the complaint filed by Mr. Gerald C. Beckwith, on behalf of his wife, Dr. Gladys Beckwith, against Station WJIM–TV alleging violations of the fairness doctrine and the equal opportunities provision of Section 315 of the Communications Act because of your failure to permit her appearance or any other legally qualified candidate's appearance following the presentation of a program titled "People and Issues" on which several candidates for the same office appeared.

In his letter of complaint filed May 14, 1973, Mr. Beckwith alleges that on Saturday, March 31, 1973, his wife was a legally qualified candidate for the Lansing (Michigan) Board of Education in the April 2 election; that he learned that several opposing candidates were to appear on a program titled "People and Issues," which was to be broadcast the following day, Sunday, April 1, at 5:00 p.m.; that he contacted the station that same Saturday evening to request that you either not broadcast the program or provide his wife and other qualified candidates equal opportunities to appear prior to the election; that you informed him that, due to a schedule change, the program had been broadcast earlier that afternoon; that he made arrangements to meet with your representative the next morning and, following a screening of the particular program, requested in writing equal opportunities for the other candidates because of the political nature and likely effect of the program on the forthcoming election; that you refused this request, contending that the program, as a news interview program, was exempt from the equal opportunities provision of Section 315, but offered time to Dr. Beckwith to speak against the issue discussed; and that Dr. Beckwith declined because she actually favored the issue. Complainant alleges that "People and Issues" is not a "bona fide" news interview program exempt under Section 315 because it is not regularly scheduled, and the particular topic, program content and selection of guests were not solely under your control. Mr. Beckwith asserts that an officer of the Lansing School District suggested the topic, format and guests.

In response to Commission inquiry, you state that the seven millage proposals (similar to a property tax), which were to be decided in

the April 2 election, were the sole topics of discussion on the program in question; that the topics were of extreme newsworthiness since the seven millage proposals were both complex and of vital interest because failure by the electorate to approve one or all would jeopardize public education in Lansing; that the idea of presenting the millage topics, while it had originated during a discussion between you and a Lansing School official, was under your control; that the guests, even though several were candidates for the school board, were selected by you because of their special ability to discuss some aspect of millage; that their candidacies were neither mentioned nor discussed on the program; and that as a news interview program, there was no need to extend equal opportunities to other school board candidates.

You further state that the congressional intent in exempting the news interview program from the equal opportunities provision was to "give broadcasters freedom to express their news judgment in permitting candidates to appear on newscasts" since some candidates were not newsworthy but could demand equal time; that to prevent abuse, Congress included the necessity that the news interview program be "regularly scheduled" and "controlled by the broadcaster"; that "regular scheduling" was intended to eliminate *ad hoc* programs which would abuse the privilege; that the illustrations cited in the legislative history were intended only as examples and not as rigid molds; and that "People and Issues", having been aired on the average of once a month for four years, was not an *ad hoc* program, but was established and identifiable and therefore a "bona fide news interview" program.

Mr. Beckwith's reply to your response, filed July 16, 1973, states that "People and Issues" was scheduled on the *average* of its four year life once a month; that it was seen over a 15 month period on five different days in nine different time periods; that this was *periodic or irregular* and not consistent with "regularly scheduled" as normally used in the field of broadcasting; that remarks made to Mr. Beckwith by Mr. John Marrs, the Lansing schools information officer, and Dr. I. Carl Candoli, the Superintendent of the Lansing School District, notwithstanding the submission of contrary correspondence, affirm the allegation that the program in question was neither your idea nor under your control; that the appearance of two school board candidates, regardless of their remarks, constituted a "use" for which equal opportunities must be afforded; and that your presentation of the millage question both advocated the guests' candidacies and the millage question and in no regard could be said to be merely a discussion of a newsworthy topic by four specially qualified experts, two of whom were only incidentally candidates.

The primary question before us is whether "People and Issues" is a bona fide news interview program, exempt from the equal opportunities provision of Section 315.

You and the complainant have cited the legislative history, precedent and Commission rulings relative to the Section 315 exemption of bona fide news interviews. Congressman Oren Harris, Chairman of the Communications Sub-Committee, stated, when the Section 315 exemptions were pending Congressional enactment, that regularly scheduled meant "every day at a certain time or every week at a certain

time" [105 Con. Rec. 17780]. Congress illustrated this definition by citing several qualified news interview programs, "Meet The Press" and "Face The Nation". In *Miami Valley Broadcasting Corp.*, 24 FCC 2d 460 (1970), the Commission relied on the fact that the particular program was viewed every Sunday at 1 p.m. In *Jon L. Britton*, 14 FCC 2d 858 (1968), the program in question had appeared every week for almost two years.

"People and Issues", while it had an average airing of once a month, was actually broadcast on a sporadic basis five different days in nine different time periods. This is supported by the following program schedule, which was based on information furnished by you and the complainant.[1]

Wednesday, January 26, 1972, 7:30 p.m.
Wednesday, February 9, 1972, 7:30 p.m.
Wednesday, March 8, 1972, 7:30 p.m.
Wednesday, March 22, 1972, 7:30 p.m.
Wednesday, April 5, 1972, 7:30 p.m.
Sunday, May 14, 1972, 5:00 p.m.
Tuesday, May 30, 1972, 7:30 p.m.
Tuesday, June 13, 1972, 10:30 p.m.
Tuesday, June 27, 1972, 10:30 p.m.
Saturday, July 15, 1972, 5:30 p.m.
Tuesday, July 25, 1972, 10:30 p.m.
Tuesday, August 29, 1972, 10:30 p.m.
Thursday, October 12, 1972, 8:30 p.m.
Thursday, October 26, 1972, 8:30 p.m.
Thursday, November 2, 1972, 8:30 p.m.
Sunday, November 5, 1972, 11:15 p.m.
Sunday, February 11, 1973, 5:00 p.m.
Sunday, February 18, 1973, 5:00 p.m.
Saturday, March 31, 1973, 5:00 p.m.
Saturday, April 21, 1973, 5:30 p.m.
Sunday, April 22, 1973, 10:30 p.m.
Saturday, April 28, 1973, 5:30 p.m.
Sunday, April 29, 1973, 10:30 p.m.

In Exhibit 8 of your renewal application filed July 2, 1973 you described "People and Issues" as a "local, public affairs program seen during various prime times for ½ hour". In the minutes of the WJIM Public Service Advisory Board of February 9, 1972, it was stated by you that "People and Issues" appeared on "Wednesday night at 7:30 p.m. in prime time on an alternate week basis."

Reference to the above schedule indicates that this alternate week schedule was not maintained and that no discernable regular schedule was. It would appear from the fact that the particular program in question here was broadcast on Saturday, March 31, because of a "schedule change" and from the scheduling history of the program that the program was scheduled when time and/or topic was available and not in its own regular slot. Although the program may have been

[1] There were several dates on which the program was scheduled but not broadcast: January 27, 1973; February 4, 1973; and May 6, 1973.

broadcast as newsworthy topics arose and not on "a meaningless mechanical and precise schedule",[2] this is not regular scheduling as defined in Commission rulings or in the legislative history.

The length of time that "People and Issues" has been broadcast is not sufficient to overcome its lack of regular scheduling. We particularly note that no program was broadcast between November 5, 1972 and February 11, 1973, a lapse of over three months. Accordingly, we believe that "People and Issues" is not regularly scheduled and therefore not a bona fide news interview program within the meaning of Section 315. In view of the foregoing, you failed to comply with the equal opportunities provision of that section by refusing Mrs. Beckwith's request for time. Although we do not believe, on the facts of this particular case, that further action is warranted, inasmuch as a "regular schedule" was specifically intended by Congress to be a determination of the "bona fides" of news interview programs, you will be expected in the future to take this into consideration in light of our decision herein.

Mr. Beckwith also alleges a fairness doctrine violation, contending that the "People and Issues" program presented only one side of a controversial issue of public importance, i.e., a favorable view of millage, and in support refers to your statement that "organized opposition to millage had evaporated by the time of the election in April."

Where a fairness complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating a *prima facie* case of violation including reasonable grounds for the claim that the station broadcast only one side of the issue in its *overall* programming. See *Allen C. Phelps*, 21 FCC 2d 12 (1969). Mr. Beckwith has not provided such information. Should he do so we will give further consideration to that aspect of his complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief*,
Complaints and Compliance Division
for Chief, Broadcast Bureau.

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[2] You stated in your response filed June 11, 1973:
Because the subject to be treated must be of topical *news importance*, as opposed to simply interviewing a single public official, it was never conceived that the program would be presented on a meaningless mechanical and precise schedule.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
AARON L. COLVIN
Concerning the Fairness Doctrine Involving NBC

MARCH 29, 1974.

Mr. AARON L. COLVIN,
730 Fidelity Union Tower,
Dallas, Tex.

DEAR MR. COLVIN: This is in response to your letter filed November 19, 1973 requesting equal time to respond to remarks made by Dr. Paul Ehrlich during an interview on the Tonight Show of November 15, 1973. In particular, you state that Dr. Ehrlich, a California biologist, had been featured several times on the show; that the host asked Dr. Ehrlich his views on the energy crisis; that Dr. Ehrlich "shotgunned" his responses unsupported by fact or figure; that he stated that the oil industry had lied about the oil crisis to ensure the success of the Alaskan pipeline project; that you have been connected with the oil industry for 44 years and were requesting at least 30 minutes air time, preferably on a Thursday evening, for yourself or your designate to refute Dr. Ehrlich's allegations; and that you were contacting the American Petroleum Institute for a possible spokesman.

The Commission, in response to that letter, sent you information concerning the necessary procedures to follow and information required for a fairness doctrine complaint.

NBC stated, in its reply to you on November 28, 1973, that contrasting viewpoints concerning the oil problem had been aired and would continue to receive coverage, citing a recent three hour program dealing with the energy crisis. Responding to your request to appear and refute Dr. Ehrlich's statements, NBC quoted the following from a recent Broadcast Bureau ruling:

> [I]f a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded each side, as would be the case if a political candidate appeared on the air during his campaign. . . . Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. In re *Complaint by Jack Baker*, 41 FCC 2d 727 (1973).

In your letter to NBC on November 30, 1973, you rejected NBC's "premise" that "a recent three hour program dealing with the energy crisis" was sufficient relief because Dr. Ehrlich had personally at-

tacked the oil industry and you by charging that it had lied and you petitioned NBC for the opportunity to refute that attack.

On December 19, 1973, NBC replied that your request for time was based on a misimpression of the relevant law; that the personal attack rule did not apply to an expression of a view directed to an amorphous group such as the oil industry; and that notwithstanding, NBC had presented contrasting views, which included an interview with Mr. Frank Ikard, President of the American Petroleum Institute. Licensee further stated, on January 22, 1974, that you had misquoted Dr. Ehrlich since his only reference to lying was:

> Nuclear plants are useless and dangerous. Industry is lying, the AEC is now saying that they [nuclear power plants] are not safe.

Both the Commission and the courts have held that on a complaint under the fairness doctrine, the burden is on the complainant to specify the particular issue involved and substantiate its controversiality and public importance, and also to show that particular broadcast material has presented one side of that issue in a cognizable fashion and that the licensee has not afforded reasonable opportunity in his overall programming for the presentation of contrasting views. See *Allen C. Phelps*, 21 FCC 2d 12 (1969).

You have presented no information to show that in its overall programming NBC has not afforded reasonable opportunity for the presentation of contrasting views on the energy crisis. In its correspondence with you NBC has referred to at least five hours of other programming which it states has and will give varying views on the issue, including those of the American Petroleum Institute.

Further, it does not appear from the information you have furnished the Commission that a personal attack was broadcast within the meaning of the personal attack rule.[1] The mere mention of a person or group, or even certain types of unfavorable references thereto, does not constitute a personal attack as defined by the Commission. Moreover, considering the evidence submitted—NBC's transcript from the program tape and your direct quotations containing the caveat, "Those may not be his exact words, but they are a very close approximation of them"—it cannot be concluded that Dr. Ehrlich was referring to the oil industry when making his comment. However, even if he were, we do not believe that the "oil industry" is the type of "identified person or group" contemplated by the personal attack rule. Mere reference to "oil industry" does not give the licensee knowledge of any specific entity or person to notify, even if the language involved specifically referred to the oil industry.

In view of the foregoing, no Commission action is warranted at this time.

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[1] 47 CFR § 73.679(a) states:
(a) When, during the presentation of views on controversial issues of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ELAINE DONNELLY
Concerning the Fairness Doctrine Involving NBC

APRIL 1, 1974.

MRS. ELAINE DONNELLY,
19724 Dale,
Detroit, Mich.

DEAR MRS. DONNELLY: This is in reply to your complaint of January 27, 1974, against the National Broadcasting Company (NBC). You enclosed copies of correspondence between yourself and NBC. In a letter from you to NBC dated July 31, 1973, you stated objections to an "editorial" in favor of the Equal Rights Amendment by Ms. Gloria Steinem on the July 26, 1973, "Helen Reddy Show" and added that you could not "believe that the FCC regulations relating to 'equal time' would allow that type of a blatant political statement without the airing of a balancing viewpoint," and suggested that an offer of "equal time" be made to Mrs. Phyllis Schlafly. In reply NBC sent to you a copy of a letter dated August 2, 1973, sent by them to Mrs. Schlafly in response to a request by Mrs. Schlafly for an opportunity to respond to Ms. Steinem's editorial. In that letter NBC rejected Mrs. Schlafly's request for an opportunity to reply, and stated:

> The fairness doctrine does not create a right in any person or group to speak to any issue on broadcast facilities, but only provides that such facilities will not be used to present one side of important, controversial public issues to the exclusion of contrasting views. In accordance with that doctrine and NBC News' own policy, our overall coverage of women's rights has included a diversity of positions. Views of those, who, like yourself, oppose ratification of the equal rights amendment have been presented not only in NIGHTLY NEWS reports but in longer interviews on NBC's TODAY show such as those with Esther Vilar and Senator Sam Ervin, Jr. NBC News will, of course, continue to cover developments, including diverse views, in this area to the extent warranted in its professional judgment.

However, Mrs. Schlafly subsequently appeared on the TODAY Show of October 18, 1973, as an opponent of the equal rights amendment in a discussion with Ms. Lucy Benson, a proponent. In a letter to NBC dated October 31, 1973, you objected to TODAY Show Hostess Barbara Walters' reading, on October 30, 1973, a letter from Ms. Kathleen H. Larkin, Deputy Attorney General of Pennsylvania, to NBC, wherein Deputy Attorney General Larkin sought to clarify what she felt was a misstatement by Mrs. Schlafly of the law of Penn-

sylvania relating to the right of support.[1] You stated that you objected to "Barbara Walters' obvious attempt to impugn Mrs. Schlafly's integrity and credibility in abstentia by triumphantly reading a letter from the . . . Attorney General's office which supposedly destroyed Mrs. Schlafly's remarks about the effect of Pennsylvania's ERA on support laws," and that, "Ms. Walters' smug reading of the misleading . . . letter amounts to a serious breach of the Fairness Doctrine." You requested that Mrs. Schlafly be given "sufficient time to properly defend her statements." In reply NBC sent you a letter dated November 8, 1973, explaining the difference between Mrs. Schlafly's interpretation of one case and the interpretation of Deputy Attorney General Larkin as to Pennsylvania law. NBC went on to say:

> Barbara Walters read this letter not to "impugn Mrs. Schlafly's integrity", but simply to inform Pennsylvania viewers of the attorney-general's interpretation. NBC does not believe that further debate as to marital rights and obligations under the present law of the Commonwealth of Pennsylvania is necessary or desirable in the interest of viewers.

In a letter to NBC dated November 27, 1973, you stated that NBC's October 31st answer was "entirely unacceptable" to you; that you had not requested an interpretation of Deputy Attorney General Larkin's letter, but had requested a copy of the letter itself; that you wanted an "explanation of why this letter was read after the 'debate' was over and Mrs. Schlafly had no chance to reply or point out the obvious misstatements in that letter"; and that NBC gave "the pro side much more time than the con side, plus the added weight and prestige of an 'Attorney General' in support of the pro position." Under cover of a letter dated November 30, 1973, NBC sent you a copy of the letter from Deputy Attorney General Larkin, which took issue with Mrs. Schlafly's interpretation of Pennsylvania law and requested an opportunity to reply to Mrs. Schlafly's statement. Instead of bringing Ms. Larkin on the TODAY Show, the letter itself was read during the TODAY Show. In a letter to NBC dated January 3, 1974, you continued to dispute the interpretation of Pennsylvania law by the Office of the Attorney General of Pennsylvania. You stated:

> The decision by NBC News to have this letter read because it supposedly refuted Mrs. Schlafly's remarks was entirely unprofessional and inexcusable. Reading this irrelevant and misrepresented letter in Mrs. Schlafly's absence gave more time and weight to the Pro position over the Con, unfairly damaged Mrs. Schlafly's personal credibility, and was a deliberate interference by NBC News in the presentation of the Equal Rights Amendment controversy.

In a letter dated January 10, 1974, NBC informed you that Mrs. Schlafly would not be given air time to reply to the letter from Deputy Attorney General Larkin, stating:

> Mrs. Schlafly, in the TODAY Show discussion with Ms. Benson, expressed a view interpreting the effect of the equal rights amendment to the Pennsylvania

[1] During the TODAY show discussion of October 18, 1973, Mrs. Schlafly stated that as a result of the Pennsylvania state equal rights amendment, women of the state no longer have a court enforceable right of support, citing the case of *Weigand* v. *Weigand*. Ms. Larkin's letter characterized this contention as a "serious misstatement of the law" of Pennsylvania, citing the case of *Commonwealth ex rel Lukens* v. *Lukens* from the Superior Court of Pennsylvania, which held that the state's support statute provided for reciprocal rights of support between husband and wife, and therefore was not unconstitutional under the state's equal rights amendment.

Constitution. The Attorney General's office expressed an opposing view, which Miss Walters read on the program. We have thus informed the public of these two viewpoints.

We do not believe that any further airing of views on the narrow issue of interpretation of the Pennsylvania Constitution is necessary or desirable in the interest of viewers.

In your letter to the Commission of January 27, 1974, in which you enclosed copies of the foregoing correspondence, you repeated the complaints made in the correspondence that Miss Walters' reading of the letter from the office of the Attorney General of Pennsylvania "in Mrs. Schlafly's absence, after the 'debate' was over, unfairly damaged her credibility and integrity, and gave more time and weight to the Pro position over the Con"; that you felt that this was unfair and that the public had been misinformed as a result; and that your complaint against the "Helen Reddy Show" involved the two minute editorial by Ms. Gloria Steinem in favor of the equal rights amendment. You also stated that the "appearance of Mrs. Schlafly on the *Today Show* in the format of a debate with an ERA proponent does not balance that pro-ERA exposure at all. Nor do the appearances of Senator Sam Ervin or anyone else back in 1972 qualify as 'balanced coverage' in 1974."

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

The Commission has stated:

[I]t has long been our policy normally to require that fairness doctrine complaints (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcast, and (c) set forth reasonable grounds for concluding that the licensee *in his overall programming* has not attempted to present opposing views on the issue. *Allen C. Phelps*, 21 FCC 2d 12, 13. (Emphasis added).

To support your contention of a fairness doctrine violation by NBC on the ERA issue you rely entirely on the two minute editorial by Ms.

104-032—74——4

Steinem on the July 26, 1973, "Helen Reddy Show", and Miss Walters' reading during the October 30, 1973 TODAY Show of the letter from Deputy Attorney General Larkin of Pennsylvania. You have made no effort to claim that NBC has not afforded reasonable opportunity for the presentation of opposing views in its overall programming.

As we have stated:

> [I]t should be remembered that there is no mechanical requirement or formula for achieving fairness. The broadcaster need not balance editorial for editorial or viewpoint for viewpoint. Moreover, there is no requirement that a licensee achieve a balance of opposing views within a single broadcast or even series of programs . . . What is required is that the broadcaster take affirmative steps to afford a reasonable opportunity for presenting contrasting viewpoints on controversial issues of public importance in the station's overall programming. *Wilber E. Schonck*, 19 FCC 2d 840, 841 (1969).

The correspondence between you and NBC indicates that NBC has presented numerous opposing viewpoints in various formats on the equal rights amendment. You have not set forth any grounds for concluding that NBC has failed to afford reasonable opportunity for the presentation of contrasting views in its overall programming on the equal rights amendment. Therefore it appears that no further Commission action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
CARL V. KERSTING
Concerning the Fairness Doctrine Involving Station KTVI, St. Louis, Mo.

APRIL 1, 1974.

Mr. CARL V. KERSTING,
804 Marion Place,
Ferguson, Mo.

DEAR MR. KERSTING: This is with reference to your complaint against television station KTVI, St. Louis, Missouri.

In a letter to KTVI dated November 29, 1973, a copy of which was sent to the Commission, you requested that KTVI afford you time to reply to a program on the SLACOG* proposal broadcast on KTVI on November 28, 1973. In a letter dated December 7, 1973, station KTVI replied that as of that date station KTVI had "complied with the Fairness Doctrine by impartially reporting opposing as well as supporting viewpoints," and requested that you submit a "position paper" stating your viewpoint so as to assist station KTVI in planning future coverage on the issue. You responded in a letter to station KTVI dated December 15, 1973, stating that station KTVI had not complied with the fairness doctrine "in relation to the program telecast last Wednesday evening" (we assume you refer to the November 28, 1973, broadcast), and setting out what you felt should be the minimum conditions for your response, including "the facilities of the station—including announcers, cameraman, technicians, both within and outside the studio—equal to those of the original telecast"; "a broadcast time of equal importance and length"; and "financing (sponsors) equal to the pro-SLACOG program." You stated in that letter that to "our knowledge our organization is the ONLY one in the area whose members can speak as 'qualified representatives of an organization having an opposing viewpoint,' " adding that "if programs are presented in the future on the subject of area-wide government, we will expect time for our organization, under the 'Fairness Doctrine,' to present our side of the issue, notwithstanding any other alleged 'answers' which might be made by other individuals or groups."

In a letter dated December 26, 1973, station KTVI requested that you clarify certain points in the correspondence from you and other

*SLACOG, St. Louis Area Council of Governments, is a proposal aimed at alleviating some of the administrative and operational problems of the numerous local jurisdictional subdivisions in the St. Louis area by placing some of the common governmental functions of each of those subdivisions under the control of a representative body which would perform those functions for the entire area.

members of your organization, and informing you that station KTVI had received a request for reply time from a Mr. Roy Bergmann, an attorney from Clayton, Missouri. Station KTVI again requested that you send them "a statement outlining as specifically as possible the views you believe should be presented and by whom," in order to allow station KTVI to decide "what further programs should be carried and which specific spokesman would be most appropriate."

In a letter to station KTVI dated January 2, 1974, you referred to the correspondence from yourself and members of your organization, and repeated your claim that yours was " 'the ONLY organization in the area' " qualified to reply to pro-SLACOG proposals and your intention to demand reply time regardless of what other opposition viewpoints are presented by station KTVI. In a letter to you dated January 8, 1974, station KTVI stated that that first broadcast of which you had complained was "expository in nature," and informed you that a one-half hour round-table discussion with two proponents and two opponents of the SLACOG proposal being given equal time to state their views had been scheduled for January 9, 1974.

In a letter to station KTVI dated January 10, 1974, you stated that the ratio of proponents to opponents on the January 9, 1973 broadcast was actually three to one, and that it was "far from a 'balanced' telecast," but that you did not at that time intend to request time to reply to the January 9 program. You further stated that station KTVI had "not as yet complied with the provisions of the Fairness Doctrine in presenting the 'other side' with regard to the telecast of November 28, 1973," repeating your demand for time to reply to that particular program.

In a letter to you dated January 11, 1974, station KTVI stated that the November 28, 1973, program had been expository in nature, neither pro- or anti-SLACOG; that the January 9, 1974 program had presented two proponents and two opponents of the SLACOG proposal; that station KTVI had complied with the fairness doctrine; and that station KTVI had no current plans to air any more specific programming on the SLACOG proposal, but would cover developments in accordance with the fairness doctrine as they occur.

The Commission is prohibited by Section 326 of the Commuications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

If a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine does not require that equal time be afforded for each side, as would be the case if a candidate for public office appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming. Both sides need not be given in a single broadcast or series of broadcasts, no individual program allegedly presenting only one side of an issue need be specifically balanced by a particular program devoted to a contrasting viewpoint, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed rather than the right of any individual to broadcast his

views which the fairness doctrine is designed to assure. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting points of view on the issue. The licensee has considerable discretion as to the techniques or formats to be employed and the spokesman for each point of view, and the Commission will review complaints only to determine whether the licensee can be said to have acted reasonably and in good faith in making its determination as to the spokesmen, format, and time allotted for the presentation of contrasting points of view. It should also be pointed out that complainants must set forth reasonable grounds for their beliefs that a licensee has not complied with the fairness doctrine in its overall programming.

You claim that station KTVI's SLACOG program of November 28, 1973, was "very biased" and "pro-SLACOG" and that KTVI has failed to comply with the fairness doctrine because no programming has been presented to balance that particular broadcast. However, KTVI has asserted that the November 28 program was "expository in nature," and you provide no specific information on the views presented on that program and no reasonable grounds to support your claim that that program was "very biased" or "pro-SLACOG." The correspondence between yourself and television station KTVI indicates than on January 9, 1973, a thirty minute discussion program between two anti-SLACOG spokesmen and two pro-SLACOG spokesmen was presented by KTVI. In addition, in its letter to you dated December 7, 1973, KTVI indicated that "some preliminary divergent views were offered" in KTVI news broadcasts since August, 1973. Therefore, on the basis of information presently before the Commission, it cannot be concluded that KTVI has failed to afford reasonable opportunity for the presentation of contrasting viewpoints in its overall programming on the SLACOG issue.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

FCC 74R-109

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JIMMIE H. HOWELL, MILTON, FLA.	Docket No. 19882 File No. BP-19402
H. BYRD MAPOLES, TRADING AS MAPOLES BROADCASTING CO., MILTON, FLA.	Docket No. 19883 File No. BP-19403
AARON J. WELLS, MILTON, FLA.	Docket No. 19884 File No. BP-19430
RADIO SANTA ROSA, INC., MILTON, FLA. For Construction Permits	Docket No. 19885 File No. BP-19431

MEMORANDUM OPINION AND ORDER

(Adopted March 25, 1974; Released March 28, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING. BOARD MEMBER KESSLER CONCURRING, IN RESULT, AND VOTING FOR A LIMITED TYPE OF SUBURBAN ISSUE RATHER THAN THE BROAD GENERAL ISSUE SPECIFIED BY THE MAJORITY.

1. By Order, released December 4, 1973, FCC 73-1249, 38 FR 34150, the Commission designated the above-captioned mutually exclusive applications for hearing on a Rule 1.65 issue directed against Jimmie H. Howell and a standard comparative issue. Now before the Review Board is a petition to enlarge issues filed on December 26, 1973, by Howell requesting the Board to add issues against H. Byrd Mapoles, tr/as Mapoles Broadcasting Company (hereinafter Mapoles), Aaron J. Wells and Radio Santa Rosa, Inc. (hereinafter Santa Rosa).[1]

ISSUES REQUESTED AGAINST MAPOLES

2. *Financial and misrepresentation issues:* Howell's request for a financial issue against Mapoles is predicated on the contention that the applicant's $36,000 estimated cost of operation is unreasonably low. Howell alleges that it will cost $36,000 just to pay the salaries of the eight individuals Mapoles proposes to employ at the new station, without any provision for any other operating expenses. In addition, Howell contends that Mapoles' financial statement accompanying its application does not reflect certain mortgages and obligations on his airplane, autos, radio equipment at his FM station WXBM-FM, and certain other personal assets. Failure to reflect these encumbrances

[1] Also before the Board are the following: (a), (b) and (c), oppositions, filed on January 25, 1974, by Mapoles, Wells, and Santa Rosa; (d) erratum in opposition, filed on February 1, 1974, by Santa Rosa; (e) comments, filed on January 24, 1974, by the Broadcast Bureau; (f), (g) and (h), replies to the oppositions, filed on February 15, 1974, by Howell; (i), (j), statement pursuant to Section 1.65 and addendum thereto, filed March 4 and March 5, 1974, respectively, by Radio Santa Rosa, Inc.

on his financial statement, argues Howell, is sufficient to warrant the addition of a misrepresentation issue. In its comments, the Broadcast Bureau submits that if in response to the petition to enlarge issues Mapoles does not itemize its first year cost of operation, a financial issue might be required. The Bureau also suggests that a misrepresentation issue might be warranted if Mapoles' response confirms Howell's allegations that the financial statement was inaccurate.

3. In opposition, Mapoles contends that its proposed facilities will be located in the same building as its FM station (WXBM–FM), and that its staff will be shared with the proposed station so that, contrary to Howell's assertion, there will not be eight full-time employees working for the proposed AM station. In addition, Mapoles asserts that the expenses for rent, utilities and maintenance will be shared with WXBM–FM. Mapoles contends that in light of this sharing arrangement, it estimated cost of operation of $36,000 is reasonable and will be covered by its $50,000 proposed bank loan. With respect to the alleged misrepresentation, Mapoles attaches to its opposition a financial amendment filed with the Administrative Law Judge on January 21, 1974.[2] Mapoles asserts that there had been an earlier clerical error with respect to the mortgage on his residence and that the equipment at WXBM–FM is being used pursuant to a lease agreement with Universal CIT Credit Corporation and therefore has not been included as either an asset or a liability on its financial statement. In reply, Howell maintains that by virtue of Mapoles' tendered amendment, the applicant has admitted its original misrepresentation and violation of Section 1.514[3] of the Commission's Rules with regard to its financial posture. In addition argues Howell, omission of any reference in the AM application to the intended sharing of AM–FM personnel also constitutes grounds for adding a misrepresentation issue.

4. The Board will deny Howell's request for a financial issue. The applicant's allocation of $36,000 to meet its first year salary expenses does not appear unreasonable on its face,[4] particularly in light of Mapoles' intention to implement a sharing arrangement of AM and FM station personnel. Moreover, the applicant has a surplus of several thousand dollars to meet any additional first year operating expenses.[5] [6] Since Howell has not specifically alleged that Mapoles' operating expenses will exceed its financial resources, the Board finds no basis for adding the requested issue. See Section 1.229(c); *California Stereo, Inc., supra*, at footnote 4.

5. With respect to the alleged failure to submit an accurate financial statement with its original application, the Board is of the view that such failure does not appear to have been with the intention of deliberately misleading the Commission. The omitted liabilities do not appear

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[2] The amendment was accepted by the Administrative Law Judge by Memorandum Opinion and Order, released February 5, 1974, FCC 74M–130.

[3] Reference in the petition to Section 1.513 is presumably an inadvertent error. Section 1.514 appropriately deals with disclosure.

[4] See *California Stereo, Inc.*, 39 FCC 2d 401, 26 RR 2d 887 (1973).

[5] In order to meet its estimated first year costs of $38,500, the applicant shows available revenue in excess of $90,000: (a) $50,000 bank loan; (b) $1,000 in existing capital; (c) $40,000, based on the past revenues of Station WEBY. Taking only into account the $50,000 bank loan and the $1,000 in existing capital, the applicant has in excess of $12,000 to cover any additional operating expenses not detailed in its application.

[6] See *Eastern Broadcasting Co.*, 39 FCC 2d 700, 26 RR 2d 1229 (1973).

to be of decisional significance since the applicant does not rely on the personal assets of Mr. Mapoles to construct its proposed station but rather on a $50,000 bank loan. Therefore, since we perceive no motive for deliberately concealing these facts from the Commission and since the matter allegedly concealed has not been shown to be of any decisional significance, we will deny Howell's request for misrepresentation and failure to disclose issues. See generally, *WIOO, Inc.*, 37 FCC 2d 140, 25 RR 2d 169 (1972); *Voice of Reason, Inc.*, 23 FCC 2d 782, 19 RR 2d 288 (1970); and *Orange County Broadcasting Co.*, 15 FCC 2d 991, 15 RR 2d 306 (1969), in which misrepresentation or failure to disclose issues were added for failure to disclose liabilities by those intending to finance the operation of the proposed station.

6. *Concentration of control issue.* By letter dated March 5, 1973, Clayton W. Mapoles, father of H. Byrd Mapoles, the applicant herein, purportedly transferred ownership of the building, tower, ground system, transmitting and monitoring equipment and land which comprised his previously licensed, but subsequently revoked, standard broadcast station, WEBY, to his son, the applicant herein. Consideration for the transaction was $25,000, to be paid any time over the next ten years. Howell alleges that this transaction was not at arm's length, is unenforceable, and therefore warrants addition of a concentration of control issue.[7] Since petitioner has failed to allege specific allegations of fact accompanied by the requisite support as set forth in Section 1.229(c) of the Commission's Rules, the Board will deny Howell's request. Mere conjecture or surmise is insufficient to warrant the enlargement of issues. See *John H. Spottswood*, 32 FCC 2d 487, 23 RR 2d 248 (1971), and cases cited therein.

ISSUES REQUESTED AGAINST WELLS

7. *Concentration of control and undisclosed principal issues.* In support of this request, petitioner alleges the following: Wells' brother-in-law, Mr. Albert Golden, owns and controls the Santa Rosa State Bank at Milton, Florida, and his sister, Mrs. Albert Golden, is the Executive Assistant to the publisher of the only newspaper in Milton; the Goldens' son (Wells' nephew), Mr. Curtis Golden, owns and operates Radio Station WSRA, Milton, Florida; and Mr. Ira Wells, the brother of applicant Aaron Wells, along with Curtis Golden and Albert Golden, comprise three members of the Board of Directors of the Santa Rosa State Bank in Milton—the bank which will assist in the financing of the Wells proposed radio station. Howell alleges that the Golden family controls all of the mass media of communications in Milton and that a grant of the Wells application would result in a 100% concentration of control of mass media in Milton, Santa Rosa County, Florida.

8. In its comments, the Bureau alleges that Howell has not supported its assertions and, even assuming their truth, precedent offers

[7] The facts, as alleged, would more appropriately be considered in the context of a request for a real-party-in-interest issue. Since Wells, in its petition to enlarge issues, filed on December 26, 1973, requests a real-party-in-interest issue predicated on similar allegations as those of Howell, disposition of this matter will be detailed in the Board's resolution of Wells' petition to enlarge issues.

no justification for the addition of hidden ownership or concentration of control issues. The Bureau contends that there is no evidence to indicate that any of the Goldens have an ownership interest in Wells' application; that a loan commitment from the Santa Rosa Bank provides no basis for adding a real-party-in-interest or hidden ownership issue; and that family relationship alone does not warrant a concentration of control issue, citing *American Broadcasting Companies, Inc.*, 25 FCC 2d 489, 19 RR 2d 1184 (1970); *Stuart W. Epperson*, 35 FCC 565 (1963); and *West Georgia Broadcasting Co.*, 23 FCC 255 (1957). In addition, the Bureau points out that the renewal application of WSRA has been dismissed with prejudice and that Howell has failed to account for the competing operation of WXBM-FM, licensed to H. Byrd Mapoles, Milton, Florida.

9. In opposition, Wells points out that, contrary to Howell's allegation, Curtis Golden no longer owns or operates Station WSRA. Moreover, argues Wells, neither Albert nor Curtis Golden have an interest in any radio broadcast stations—the only operating radio station is WXBF-FM owned by H. Byrd Mapoles and therefore the Golden family does not control the mass media of communications in Milton. Wells also contends that employment at a local newspaper is insufficient ground upon which to predicate the addition of a concentration of control issue.[8] In any event, argues Wells, there is no basis for the requested issue since the applicant has no interest in any newspaper or other mass media of communication.

10. Wells also opposes addition of a hidden ownership issue. Wells argues that the test for a real-party-in-interest issue is whether some third person has an ownership interest or is or will be in a position to actually or potentially control the operation of the stations, citing *Creek County Broadcasting Co.*, 31 FCC 2d 462, 22 RR 2d 891 (1971). Wells contends that closer family ties than are present here have been rejected as insufficient ground to add hidden ownership issues, citing *Northeast Oklahoma Broadcasting, Inc.*, 42 FCC 2d 237, 27 RR 2d 524 (1971); and *Corvallis Broadcasting Corp.*, 38 FCC 2d 30, 25 RR 2d 824 (1972). Wells also maintains that there is no evidence suggesting that as a result of the family relationships which exist at the bank the applicant will, in fact, be controlled by the bank, citing *D. H. Overmeyer Communications Co.*, 4 FCC 2d 496, 8 RR 2d 96 (1966).[9] In order to dispel any question of hidden ownership, however, Wells submits the affidavits of himself, Mr. Albert Golden, Mrs. (Jewell) Albert Golden and Curtis Golden, all of whom deny the existence of any hidden ownership.

11. Howell's request for concentration of control and real-party-in-interest issues will be denied. We agree with both the Bureau and Wells that petitioner has failed to allege any facts sufficient to warrant addition of the requested issues. First, it appears that Mrs. Golden no

[8] Wells points out that Mrs. Golden has disposed of her publishing interests in the Milton Times and that Wells' brother is not president of the Times as alleged by Howell; it was Mrs. Golden who served as its president prior to the sale of the paper to the Milton Press Gazette. Ira Wells, according to Wells, has no position or interest with any Milton medium of communication.

[9] Wells also points out that he is relying upon over $70,000 of his personal funds, in addition to the $50,000 bank loan, to finance the station.

longer has an ownership interest in the local newspaper and Radio Station WSRA is no longer owned by Curtis Golden. However, even, assuming that the Goldens had mass media interests in Milton, it is well established that family relationship alone is insufficient to warrant the addition of a concentration of control issue. See *Morris's Incorporated*, FCC 73R–411, 44 FCC 2d 321, released December 18, 1973; *Stuart D. Epperson, supra.* With regard to the *bona fides* of the bank loan commitment from the Santa Rosa State Bank and request for a real-party-in-interest or hidden ownership issue, petitioner's allegations are based on surmise and speculation and therefore totally unacceptable. There is no indication either from a review of the bank loan commitment or petitioner's bare assertions regarding the family relationship at the bank that the bank will assume either direct or direct control of the proposed station. The requested issues, therefore, must be denied. See *Northern Oklahoma Broadcasting, Inc.*, 42 FCC 2d 237, 27 RR 2d 524 (1974); *cf. KALT–FM, Inc.* FCC 73R–351, 43 FCC 2d 252, released October 12, 1973.

ISSUES REQUESTED AGAINST SANTA ROSA

12. *Financial Issues.* Santa Rosa intends to partially finance the construction of its proposed station from capital contributions of its two stockholders, Robert Smith and Leon Hinote, both of whom have secured $25,000 bank loans. The loan to Mr. Hinote is secured by certificates of deposit; the loan to Mr. Smith, from the Santa Rosa State Bank, is unsecured. In addition, the applicant has secured a $75,000 bank loan from the Santa Rosa State Bank on the personal guarantees of Robert Smith and Leon Hinote and certain real estate of Leon Hinote. The terms of repayment provide that only interest need be paid during the first year. Howell alleges that addition of a financial issue is warranted since the loan to Mr. Smith contains no terms or provisions for repayment of the loan as required by Section III, paragraph 4 of the application and the bank loan to the applicant in the sum of $75,000 is most unusual: the real estate serving as collateral is already encumbered and Mr. Hinote is financially weak since he owes the bank $61,004 on real estate valued at approximately $54,000.

13. First, the Board agrees with the Bureau and Santa Rosa that no financial issue is warranted based on the bank's failure to set forth the terms of repayment in its loan commitment letter to Mr. Smith. "Where a loan runs to a stock subscriber, not to the applicant, it is not necessary to specify the terms of repayment of that loan." *Calojay Enterprises, Inc.*, FCC 71–1262, 33 FCC 2d 690 at 691. Also see *Western Communications, Inc.*, 39 FCC 2d 1077, 1083, 26 RR 2d 1456, 1465 (1972). However, while it is true that the Commission will not substitute its judgment for a bank in determining whether a loan should be made to an individual or applicant, the Commission will review the reasonableness of such loan by requiring the submission of individual stockholders' balance sheets. See *Calojay Enterprises, Inc., supra.* We disagree with Santa Rosa's argument that this principle should be limited to stock subscription commitments and should not apply to capital contribution obligations. We fail to see the distinction

and are of the view that the general principle enunciated in *Calojay* applies in all situations where there is some reason to suspect the *bona fides* of a bank loan commitment. Since Santa Rosa has included in its opposition the balance sheets of both Mr. Smith and Mr. Hinote, the Board has reviewed the reasonableness of the bank's loan commitments in our discussion below.

14. Mr. Hinote's balance sheet reflects a net worth of $176,950.[10] In addition, attached to Santa Rosa's opposition is a letter from the Santa Rosa State Bank stating that it agrees to cancel the real estate mortgage on the land given as collateral for the $75,000 loan commitment to the applicant and that it is aware of the $61,004 mortgage. Since Mr. Hinote's net worth is in excess of $170,000, the Board is of the view that the bank had ample justification to agree to lend the applicant $75,000 secured by Mr. Smith's and Mr. Hinote's personal guarantees and certain real estate. In addition, although Mr. Smith's net worth is less than $30,000, it does not appear to have been unreasonable for the bank to lend him $25,000, unsecured, particularly in light of its having done business with him satisfactorily since 1966. We will, therefore, deny Howell's request for financial issues based upon these allegations.[11]

15. *Concentration of control and hidden ownership issues/relationship of Santa Rosa State Bank and Santa Rosa, Inc.* Howell alleges that the Santa Rosa State Bank's loan to the applicant coupled with the employment of Robert Smith at Radio Station WSRA and the extensive media interests of the Golden family in Milton, all evidence a situation which warrants the addition of concentration of control, hidden ownership and misrepresentation issues.[12] In opposition, Santa Rosa argues that Howell has failed to allege facts reflecting that the Santa Rosa State Bank's relationship with the applicant is anything but that of lender-borrower. In addition, the applicant has attached a letter from the bank in which its president attests to the exclusive creditor-debtor relationship which exists between it and Santa Rosa. Santa Rosa also argues that the net worth of Mr. Smith and Mr. Hinote exceeds $200,000, and thereby demonstrates, in and of itself, the baselessness of Howell's charges. With regard to Mr. Smith's employment at WSRA, Santa Rosa alleges that the income derived from his employment was a nominal $307.50 in 1973,[13] and that Mr. Smith serves as part-time correspondent for other stations as well. Finally, Santa Rosa points out that there have been no specific allegations by Howell which demonstrates a hidden relationship between the Goldens, the bank and the applicant.

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[10] On March 4 and 5, 1974, Santa Rosa filed a statement pursuant to Section 1.65, and addendum thereto, informing the Commission that Mr. Hinote, along with a Mr. Stokes, purchased realty in Florida and jointly assumed an obligation with the First National Charter Bank of Milton in the amount of $64,987.72. This transaction has a *de minimus* effect on Mr. Hinote's net worth and the applicant has submitted a statement from the Santa Rosa Bank in which its president expresses awareness of this matter and states that it does not affect the bank's loan commitments to Mr. Hinote.

[11] We agree with Santa Rosa that, contrary to Howell's assertion, provision was made in Section III, page 2 of its application for first year payments of interest and principal to the Gates Radio Company. Therefore, no financial issue is warranted based on this erroneous allegation.

[12] The Board's disposition of the misrepresentation allegations are discussed, *infra* at paragraph 17.

[13] See Erratum in Opposition, filed on February 1, 1974, by Santa Rosa.

16. The Board agrees with both Santa Rosa and the Bureau that Howell has not pleaded sufficient facts to demonstrate and support the alleged surreptitious relationship between the bank and the applicant. We will therefore deny petitioner's request for concentration of control and hidden ownership issues. See *Calojay Enterprises, Inc., supra*, and our discussion at paragraph 11, *supra*.

17. *Misrepresentation issues.* Howell alleges that Santa Rosa misrepresented facts regarding the ownership of the property proposed as a transmitter-studio site when it represented that it owned the property "free and clear." Howell contends that the property was encumbered and that Mr. Hinote had entered into an agreement to sell the site—a fact of which the Commission was never informed. In opposition, Santa Rosa argues that the land was mortgaged with the Santa Rosa State Bank, but that it had negotiated with the bank in April to cancel the mortgage; subsequently, the bank issued a letter expressing its willingness to lend the applicant $75,000, secured by the personal guarantees of Mr. Smith and Mr. Hinote and the property in question. It was in a statement of June 5 submitted with the Santa Rosa application, the applicant notes, that Mr. Hinote agreed to personally guarantee the loan and represented that he owned the land "free and clear," based upon his prior negotiations with the bank, and substantiated, in the opposition pleading, by the bank's president. Although the Board is of the view that Mr. Hinote should have explained the cancellation of the prior mortgage in his June 5 letter, we are not persuaded that a substantial question has been raised as to whether the applicant deliberately sought to deceive the Commission. If Mr. Hinote had been dealing with a second bank in pledging the property as security, there may have been good reason to suspect, not only the *bona fides* of the Santa Rosa's bank commitment, but Mr. Hinote's candor with respect to the applicant's financial qualifications as well. This was not the case, however. Mr. Hinote was dealing with the same bank and we can perceive no reason for making the representation in question other than with the prior understanding he had had with the bank as set forth in the opposition. We will, therefore, deny Howell's request for a misrepresentation issue based on these allegations.

18. With respect to the availability of its proposed site, Santa Rosa contends that, although it had entered into an agreement to sell the property proposed as its transmitter site on March 13, 1973, in May, 1973, prior to the filing of its application, it renegotiated the sale and substituted other property in its place. Therefore, argues the applicant, at the time it filed its application, it had assurances that the former agreement would be rescinded and that the site would be available as represented. In its opposition, the applicant attaches an affidavit from the proposed buyer confirming the facts as set forth above. The Board agrees with Santa Rosa that it did have reasonable assurance that its proposed site would be available as represented and we will, therefore, deny Howell's request for a misrepresentation issue. See *Seaborn Rudolph Hubbard*, 19 FCC 2d 630, 17 RR 2d 177 (1969).

19. Howell also requests a misrepresentation issue based upon Santa Rosa's representation that its estimated first year operating costs were based, in part, on a complete operating cost breakdown supplied by

station WCNV, Crestview, Florida. In support of this assertion, Howell submits a statement from Vernon Cooper, partner of WCNV, stating that neither he nor his partner nor a station salesman released a complete breakdown of the costs of operating the station to Mr. Smith. Mr. Cooper does state, however, that Mr. Smith visited him in May, 1973 and that "the cost of operating a radio station was discussed briefly." However, Mr. Cooper continues, the matters discussed were limited to the "broadest of terms and generalizations as it lasted for a period of only a few minutes." In opposition, Santa Rosa contends that Mr. Cooper's unsworn letter does not comply with the affidavit requirement of Section 1.229(c) of the Commission's Rules. In addition, Mr. Smith avers that his meeting with Mr. Cooper lasted about 45 minutes; that he did not request the station's financial records but that he did discuss the station's operating procedures and the cost of its operation; and that Mr. Cooper's information was based on his "personal knowledge and memory as as a long time broadcaster in a small market radio station . . . ".

20. The Board agrees with Santa Rosa that Mr. Cooper's letter does not comply with the affidavit requirement of Section 1.229(c) and therefore is procedurally defective. Moreover, Mr. Cooper's letter does substantiate that a conversation took place with Mr. Smith and that cost of operating a station was discussed. Although the recollections of the individuals differ with respect to the details and length of the conversation, we agree with Santa Rosa that Howell has failed to demonstrate the materiality or significance of the *de minimus* differences in recollection. Moreover, the interview with Mr. Cooper does not appear to have been the applicant's sole basis for estimating its first year operating costs and there is no challenge by Howell to the reasonableness of the estimate. We will, therefore, deny petitioner's request for a misrepresentation issue based on these allegations.

21. *News Management and Character Issues.* Howell predicates its request for a news management issue on allegations that Mr. Hinote, while serving in his capacity as Sheriff in Milton, Florida, was compelled by the courts to turn over for public inspection certain arrest information. Petitioner predicates its request for a character issue on two newspaper articles reporting two incidents which occurred during Hinote's term as sheriff—a diamond ring which turned up missing after it was taken into custody but which was later returned to its owner, and a tractor which was confiscated by the sheriff but which was parked on private property rather than on the Sheriff Department's parking lot. Although Mr. Hinote, in opposition, attests to his knowledge of the circumstances surrounding these incidents, the Board is of the view that no extensive discussion of his recollection is necessary. Howell's petition is totally defective under the requirements of Section 1.229(c) of the Commission's Rules. The Board fails to find any support for adding a "news management" issue in a court order directing Sheriff Hinote to release arrest records for public inspection. Although the sheriff's decision to withhold this information may have been improper, we are not of the view that judicial action limiting the discretionary powers of a public official adversely reflects, in itself, on the official's character. Similarly, newspaper articles reporting possible impro-

prieties, all of which have been denied, are hearsay and insufficient to support enlargement of issues under Section 1.229(c) of the Commission's Rules. In this regard, the Board has stated that it has "... in the past ordinarily declined to intervene in matters of alleged violations of federal or local law where the matters have not been presented to or acted upon by the authority charged with the responsibility of interpreting and enforcing those laws." *WIOO, Inc.*, 40 FCC 2d 217 at 219–220, 26 RR 2d 1611 at 1614 (1973). In the instant case, it appears that the local authorities were well aware of these incidents and yet brought no charges against Mr. Hinote. Petitioner's attempt to litigate these bare allegations before the Commission is highly inappropriate. We will, therefore, deny the requested misrepresentation issue.

22. *Suburban Issue.* Howell maintains that Santa Rosa's community survey is grossly inadequate since no problems or comments are specified opposite the name of the particular interviewee, and because there is no disclosure as to who prepared the survey. In opposition, Santa Rosa points out that at pages 7 and 20 of Exhibit 8 in its application, the applicant states that the survey was conducted under the supervision of Mr. Smith and that he personally interviewed each community leader and supervised the survey of the members of the general public. The applicant argues that the specific comments elicited of the interviewees need not be reflected in its survey.

23. The Board agrees with both the Bureau and Santa Rosa that there is no requirement that the applicant set forth the responses elicited from the interviewees opposite their names. In this regard, therefore, petitioner's allegations are without merit. See Q & A 21 of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). With regard to the applicant's survey of the general public, however, the applicant states that the survey was conducted under the supervision of Mr. Smith, majority stockholder and proposed General Manager of Santa Rosa. There is no indication, however, to what extent Mr. Smith participated in the survey of the general public or whether the survey was conducted by principals, employees, or prospective employees of the applicant. See Q & A 11(b) of the *Primer on Ascertainment of Community Problems by Broadcast Applicants, supra; Voice of Dixie, Inc.*, FCC 74–225, —— FCC 2d ——, released March 15, 1974. In light of this deficiency, the Board will add a *Suburban* issue.

24. *Rule 1.65 Issue.* Howell alleges that Santa Rosa failed to amend its application to reflect the purchase of stock from one of the applicant's original stockholders, Mr. Glynn Elliot. According to petitioner, Mr. Elliot's interest was purchased for $500 down and $1,000 owing, and this transaction was not reflected on the corporaton's balance sheet. In opposition, Santa Rosa alleges the following: (1) that Mr. Elliot's initial investment in the Corporation was $1,500; (2) that by May 16, corporate organizational expenses, as reflected on the corporate balance sheet, had exceeded $3,000; (3) that Mr. Elliot's pro-rata share of these expenses was $1,000 and that $500 was refunded to him in consideration of his withdrawal from the application venture and assignment of his interest to Mr. Smith. According to Santa Rosa, this transaction occurred prior to the filing of its application and therefore

there was no reason or obligation to report this matter to the Commission. Mr. Hinote did, as alleged by Howell, gratuitously offer to reimburse Mr. Elliot for the $1,000 loss if the radio station was successful. Attached to the opposition are the affidavits of Earl L. Lewis, Esq., local counsel for the applicant, Mr. Elliot, and Mr. Hinote, all attesting to the veracity of the above facts.

25. The Board is in agreement with both Santa Rosa and the Bureau that the request for a 1.65 issue is totally lacking in support as required by Section 1.229(c) of the Commission's Rules. We find no impropriety regarding the above transaction and since it occurred prior to the filing of the application, Santa Rosa had no obligation to report the transaction to the Commission. We will, therefore, deny Howell's request for a 1.65 issue.

26. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed December 26, 1973, by Jimmie H. Howell, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

27. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

To determine the efforts made by Radio Santa Rosa, Inc. to ascertain the community problems of the area to be served and the manner in which the applicant proposes to meet these problems.

28. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof under the issue specified SHALL BE upon Radio Santa Rosa, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-96

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ITAWAMBA COUNTY BROADCASTING CO., INC., FULTON, MISS. AUBREY FREEMAN, TRADING AS TOMBIGBEE BROADCASTING CO., FULTON, MISS. For Construction Permits	Docket No. 19838 File No. BPH-8028 Docket No. 19839 File No. BPH-8189

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1974; Released March 18, 1974)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually-exclusive applications of Itawamba County Broadcasting Company, Inc. (Itawamba) and Tombigbee Broadcasting Company (Tombigbee) for authorization to construct a new FM broadcast station in Fulton, Mississippi. The applications were designated for hearing on a standard comparative issue by Order of the Chief, Broadcast Bureau, acting pursuant to delegated authority, 38 FR 28587, published October 15, 1973. Now before the Review Board is a petition to enlarge issues, filed October 29, 1973, by Itawamba,[1] requesting the addition of misrepresentation and *Suburban* issues against Tombigbee.

2. By way of background, in Exhibit H of Tombigbee's application (Tombigbee's Ascertainment of Community Needs exhibit), it is stated that the applicant conducted a personal and telephone survey during October and November, 1972, with individuals and groups to determine the needs and interests of its proposed service area. Tombigbee then listed 36 individuals and their respective occupations and/or community activities. However, with the exception of one individual, J. E. Staub,[2] Tombigbee did not identify these individuals as "community leaders". Immediately after this list, Tombigbee stated:

> . . . plus 114 other individuals and radio listeners throughout Fulton and Itawamba County were contacted in our community needs survey. Attached as Appendix A is a complete list of the names of persons contacted. The community leaders were contacted by *Ralph Mathis* and *Aubrey Freeman*. All other interviews were conducted under the direct supervision of Mathis and Freeman. (Emphasis supplied.)

In Appendix A, Tombigbee listed 150 individuals, their respective occupations, their places of residence, and, in some cases, their religious

[1] Also before the Board are: (a) comments, filed December 3, 1973, by the Broadcast Bureau; (b) "reply", filed December 13, 1973, by Tombigbee; and (c) a reply, filed January 14, 1974, by Itawamba. Tombigbee's "reply" will be considered as an opposition to Itawamba's petition (see Section 1.294 of the Commission's Rules).

[2] J. E. Staub is identified as "Community Leader and President of J. E. Staub Construction Company."

preferences.[3] Itawamba alleges that Tombigbee is guilty of "gross misrepresentation to the Commission" with respect to its community survey since numerous individuals listed as community leaders and members of the general public were never contacted by the applicant; numerous community leaders were never contacted by Mathis or Freeman; and a number of individuals, allegedly contacted, were deceased at the time the survey was conducted. Itawamba also alleges that Tombigbee's survey does not comply in several respects with the requirements of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

MISREPRESENTATION ISSUE

3. In support of its request for a misrepresentation issue, Itawamba attaches 27 affidavits to its petition from persons allegedly contacted by Tombigbee in connection with Tombigbee's survey of community leaders and members of the general public. Twenty-one of the affiants state they were never contacted by Tombigbee in October and November, 1972, regarding a survey of community problems. Fifteen of the affiants, all of whom are listed in Exhibit H of Tombigbee's application and considered as community leaders by Itawamba,[4] deny that they are acquainted with or have ever been contacted by Freeman or Mathis concerning the problems of Itawamba County.[5] (See paragraph 2, *supra*.) Itawamba also attaches an affidavit from Pauline Walton, Circuit Clerk of Itawamba County, wherein she states that the names of "R. K. Houston", "O. K. McFerrin" and "T. F. Evans" were removed from the Itawamba County Voting Pool Books since they were deceased before the months of October and November, 1972.[6] Itawamba also submits an affidavit from James Henry, plant manager of Fulton Blue Bell, wherein he states that 11 persons listed by Tombigbee as employees of Fulton Blue Bell were not employed by the plant during October and November, 1972. In sum, Itawamba argues that a misrepresentation issue should be specified against Tombigbee for its failure to contact numerous interviewees and for the failure of its principals, Freeman and Mathis, to contact all community leaders as represented in Exhibit H. The Broadcast Bureau supports addition of the requested issue, absent a satisfactory explanation by Tombigbee in its responsive pleading.

4. Tombigbee, in opposition, submits affidavits from 20 of the 21 persons who stated they were not contacted, as well as survey sheets for all 21 persons.[7] Four of the affiants state that they *were*, in fact, contacted by Tombigbee regarding a community survey, but 17 state that they were not contacted by Tombigbee or do not recall being contacted by Tombigbee. Tombigbee argues that it contacted 150 people

[3] This list included all but a few of the 36 individuals listed in Exhibit H.
[4] Itawamba assumes that the 36 interviewees listed in Exhibit H are community leaders since their names are listed in Exhibit H and then duplicated in Appendix A.
[5] However, 8 of the 15 affiants state that they were contacted by a representative of Tombigbee regarding community problems but not by Freeman or Mathis.
[6] Tombigbee represented in its application that these persons were contacted in October and November, 1972.
[7] The survey sheets contain the name, address, occupation, community organizations and comments of each interviewee, as well as the signature of the interviewer and the date of the interview. Tombigbee does not, however, submit affidavits from the interviewers.

and that "the small amount of people who say they cannot remember being contacted, after a lapse of time of more than a year, is certainly not sufficient enough to warrant adding any issues against Tombigbee regarding its survey." Tombigbee states that it never represented that the 36 interviewees listed in Exhibit H were community leaders. According to Tombigbee, "Ralph Mathis and Aubrey Freeman contacted at least 23 community leaders and other individuals" of which 13 were personally contacted by Mathis and 10 by Freeman.[8] With respect to the affidavit of Pauline Walton, Tombigbee argues that Harriet Heyboer, an employee, contacted Mrs. R. K. Houston and Mrs. O. K. McFerrin and that they were mistakenly identified in its survey as "R. K. Houston" and "O. K. McFerrin."[9] Tombigbee states that "someone was talked to at the T. F. Evans Lumber Company and Mrs. Harriet Heyboer thought it was T. F. Evans."[10] Tombigbee submits affidavits from several Blue Bell employees stating that all 11 persons listed as employees of Fulton Blue Bell were employed by Blue Bell, but not at Blue Bell's Fulton plant. According to Tombigbee, "it was simply an incorrect conclusion on the part of Tombigbee that if the people were talked to in Fulton, they worked in that plant."

5. In the Review Board's opinion, substantial questions have been raised regarding the accuracy of representations made by Tombigbee in its application. Initially, the fact that seventeen persons have stated in affidavits submitted by both Itawamba and Tombigbee that they were not contacted by Tombigbee regarding a community survey or do not recall being contacted is sufficient, in itself, to warrant the addition of a misrepresentation issue. See *Belo Broadcasting Corporation*, 42 FCC 2d 1011, 28 RR 2d 732 (1973); *California Stereo, Inc.*, 39 FCC 2d 401 (26 RR 2d 887 (1973). However, in addition to numerous persons who may not have been contacted, it is alleged that three interviewees were deceased at the time Tombigbee conducted its survey and Tombigbee's explanation is not adequately supported by the affidavits or survey sheets it submitted in opposition. (See note 6, *supra*.) In this regard, we are unable to attach any weight to the survey sheets submitted by Tombigbee since none of the sheets are supported by affidavits of the interviewers. Tombigbee offers no explanation for its failure to obtain affidavits from Harriet Heyboer or any of the other interviewers employed by Tombigbee.[11] Furthermore, the Board notes that "Tombigbee's list of community leaders and members of general public is permeated by numerous apparent errors

[8] Although Tombigbee lists the individuals contacted by Freeman and Mathis in its responsive pleading, it does not specifically designate them as community leaders and its explanation that Freeman and Mathis "contacted at least 23 community leaders and other individuals" is, in the Board's opinion, ambiguous, at best.

[9] Tombigbee attaches an affidavit from Mrs. R. K. Houston stating that she does not remember being contacted by Harriet Heyboer and an affidavit from Ralph Mathis stating that Mrs. O. K. McFerrin told him that she may have been contacted by Harriet Heyboer but refused to sign an affidavit. In addition, the interview sheets submitted by Tombigbee indicate that Harriet Heyboer contacted "R. K. Houston" and "O. K. McFerrin", not Mrs. Houston or Mrs. McFerrin.

[10] This statement, however, is not supported by an affidavit of someone with personal knowledge.

[11] In this respect, the affidavits of Freeman and Mathis, also attached to Tombigbee's responsive pleading, are based, in large part, upon "hearsay" and, as such, do not comply with Section 1.229(c) of the Commission's Rules.

regarding the names, occupations and residences of the interviewees.[12] In the Board's view, Tombigbee's persistent failure to correctly identify its interviewees and their respective occupations and residences, when viewed together with its apparent failure to contact numerous individuals listed in Exhibit H and Appendix A, raises serious questions as to whether there has been a pattern of deliberate misrepresentation and/or gross negligence on the part of Tombigbee; these questions must be fully explored in hearing. See *Belo Broadcasting Corporation, supra; California Stereo, Inc., supra.*

6. Regarding Itawamba's allegation that Freeman and Mathis did not contact all of Tombigbee's community leaders as represented in its application, the Board notes that Tombigbee has not specifically identified those individuals it regards as community leaders in either its application or in its responsive pleading to Itawamba's petition. Without this information we are unable to determine whether Freeman and Mathis contacted all of the community leaders interviewed by Tombigbee, and, thus, whether Tombigbee misrepresented facts in this connection to the Commission in its application. In effect, Tombigbee has placed the burden of identifying its community leaders upon the Review Board. The identification of these leaders on the basis of assumption or inference would, in the Board's view, be speculative and wholly unsatisfactory. Accordingly, the Board believes that the identity of Tombigbee's community leaders must be determined at the hearing. In light of all the foregoing, an appropriate misrepresentation issue will be specified herein.

SUBURBAN ISSUE

7. Itawamba alleges that Tombigbee's community survey is deficient, in part, since Ralph Mathis, a 51 percent partner and proposed general manager, withdrew from the applicant in June of 1973. According to Itawamba, Mathis "may have assumed overall responsibility for the preparation of the surveys" and Tombigbee's surveys are invalid to the extent he participated in their completion, citing *Childress Broadcasting Corporation of West Jefferson*, 37 FCC 2d 766, 25 RR 2d 711 (1972), review denied FCC 73-433, released April 25, 1973. Itawamba also alleges that the affidavits attached to its petition to enlarge issues (see paragraph 3, *supra*) indicate that Tombigbee contacted 21 community leaders, none of whom were

[12] Specifically, Lowell Sartin of Tremont, Mississippi is identified as "Lionel Sartain" of Fulton, Mississippi; Don Leathers is identified as "Game Warden, Itawamba County" whereas his father, James T. Leathers, is a game warden and Don is a student at the University of Mississippi; Webel Wright Mabus is identified as "Ben Mabus" whereas Mabus goes by the nicknames of "Bur" and "W.W."; Robert Pruitt is identified as a "Teacher in Fulton High School" whereas he is an Instructor at Itawamba Agricultural High School; J. E. Staub is identified as "President of J. E. Staub Construction Company", but had not held that job for several years prior to 1972; Rev. Louis McGee is identified as "Minister, Zion Baptist Church" of Mantachie, Miss. whereas McGee is a minister of the Spring Hill Baptist Church of Bonneville, Miss.; Rev. Randall Thompson is identified as "Pastor of Unity Baptist Church, Mantachie" whereas he is not a minister and is employed by C & P Auto Parts of Fulton—his father, Rev. Colon V. Thompson is a minister at Unity Baptist Church, Guntown, Mississippi; 11 persons are listed as employees of Fulton Blue Bell whereas they are employed by Blue Bell at plants located elsewhere; and "T. K. Houston" and "O. K. McFerrin" are listed as being contacted whereas Mrs. Houston and Mrs. McFerrin may have been contacted instead.

black, while Tombigbee's demographic data shows that 8% of the population of Fulton, Mississippi is black. Itawamba argues that the *Primer*, *supra*, Q. & A. 4 requires that an applicant consult with leaders of all significant groups in the area; that Tombigbee failed to consult with black leaders; and that the issues should be enlarged to include a *Suburban* issue against Tombigbee, citing *Community Broadcasters, Inc.*, 33 FCC 2d 714, 23 RR 2d 723 (1972).

8. In opposition, Tombigbee argues that Freeman and Mathis contacted "at least 23 community leaders and other individuals", of which Freeman contacted 10, and that the "individuals contacted by Aubrey Freeman alone are sufficient to satisfy the requirements of the Primer." Tombigbee states that there is no merit to Itawamba's contention that no black community leaders were contacted since "[t]he black population of the area is only 8% and a sufficient number of black individuals were contacted to satisfy the requirements of the Primer."[13] The Bureau opposes the addition of a *Suburban* issue based upon the interviews conducted by Ralph Mathis; according to the Bureau, Itawamba's reliance upon *Childress*, *supra*, is misplaced.[14] However, the Bureau states that it would not oppose the addition of a *Suburban* issue in light of the alleged discrepancies in Tombigbee's survey absent a satisfactory explanation by Tombigbee in its responsive pleading. In reply, Itawamba argues that Tombigbee's failure to interview any black leaders together with the numerous errors committed by Tombigbee elsewhere in its survey, raise doubts regarding the overall validity of its survey which requires the addition of a *Suburban* issue.

9. The Board will add a *Suburban* issue against Tombigbee. First, since Tombigbee has failed to identify its community leaders, the Board cannot determine whether Tombigbee has interviewed community leaders who are representative of the groups existing in the Fulton area. See *Dowric Broadcasting Co., Inc.*, 37 FR 4376, published March 2, 1972, where the Commission specified a *Suburban* issue, in part, because the applicant did not state "which persons contacted [were] community leaders and which [were] members of the general public." Second, in light of the questions already raised by Itawamba regarding Tombigbee's representations and the possibility that numerous alleged interviewees may not have been contacted by Tombigbee, the Board believes that a question is raised with respect to the overall adequacy of Tombigbee's survey. Third, it is impossible to determine whether Tombigbee interviewed any black community leaders since Tombigbee failed to identify any of its community leaders. However, even if we were to assume, *arguendo*, that the 23 persons contacted by Freeman and Mathis and listed by Tombigbee in its op-

[13] An examination of the list of contacts made by Freeman and Mathis reveals that none is black.

[14] In *Childress*, the Board concluded that an applicant's survey was inadequate since 53 of the 61 interviews with community leaders were conducted by a part-time student employee who would not be in a management or policy making role for the proposed station even though he was an officer and director. The Board further concluded that he was appointed to these positions "solely for the purpose of compliance with the requirements of the Primer." 37 FCC 2d at 769, 25 RR 2d at 715.

position are, in fact, Tombigbee's community leaders, an examination of this list does not indicate that any of the 23 interviewees is black. Thus, it appears that Tombigbee may not have complied with the *Primer*, *supra*, Q. & A. 14, which requires that an applicant consult with community leaders from all significant groups within its proposed service area. In our view, 8 percent of the population of Fulton, Mississippi could constitute a significant group.[15] See *St. Cross Broadcasting, Inc.*, 39 FCC 2d 1067, 26 RR 2d 1311 (1973). In light of the above, an appropriate *Suburban* issue will be specified herein. The Board notes, however, that it does not believe that Itawamba has raised a question regarding the validity of those interviews conducted by Ralph Mathis. In our view, the fact that Mathis later withdrew from the Tombigbee application does not render Tombigbee's entire survey deficient. See *Northeast Oklahoma Broadcasting, Inc.*, 42 FCC 2d 237, 27 RR 2d 524 (1973).

10. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed October 29, 1973, by Itawamba County Broadcasting Company, Inc. IS GRANTED to the extent indicated below, and IS DENIED in all other respects;

11. IT IS FURTHER ORDERED, That the issues herein ARE ENLARGED by addition of the following issues:

(1) To determine whether Tombigbee Broadcasting Company misrepresented facts to the Commission in connection with its survey of community problems and, if so, to determine the effect thereof on its qualifications to be a Commission licensee.

(2) To determine the efforts made by Tombigbee Broadcasting Company to ascertain the community problems of the area to be served and the manner in which the applicant proposes to meet these problems.

12. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence with respect to issue (1) above SHALL BE on Itawamba County Broadcasting Company, Inc.; that the burden of proceeding with the introduction of the evidence with respect to issue (2) above SHALL BE on Tombigbee Broadcasting Company; and that the burden of proof with respect to both issues SHALL BE on Tombigbee Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[15] In this respect, Tombigbee is clearly mistaken when it argues that "a significant number of black individuals were contacted to satisfy the requirements of the Primer." The *Primer* requires that an applicant consult with "community leaders from each significant group" and the fact that Tombigbee may have interviewed numerous blacks with respect to its survey of the general public does not comply with *Primer's* requirements regarding surveys of community leaders. See *Primer, supra*, Q. & A. 14.

FCC 74-214

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
PACIFIC BROADCASTING CORP.
Concerning extension of Waiver of Rule 73.661 With Respect to Station KUAM-TV, Agana, Guam

FEBRUARY 27, 1974.

AIRMAIL

PACIFIC BROADCASTING CORP.,
Station KUAM-TV,
Agana, Guam

GENTLEMEN: This refers to your request for an extension of the waiver of section 73.661 of the Commission's rules, to permit operation of television broadcast station KUAM-TV by a licensed third-class radiotelephone operator rather than by the holder of a first-class license.

The Commission is of the view that a waiver of the rule is in order, to permit you to seek arrangements for administration of the first-class license examination of Guam. Therefore, the waiver is hereby extended for an additional 120 days, or until June 1, 1974. However, the Commission does not believe the public interest is served by repeated extensions of the waiver, and, accordingly, no further extensions will be granted. If arrangements cannot be made between now and June 1, 1974, for administering the first-class license examination on Guam, it will be your responsibility to take whatever other measures are necessary to assure that station KUAM-TV is at all times operated by the holder of a first-class radiotelephone operator's license, in accordance with section 73.661 of the rules.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-284

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE PRIME TIME ACCESS RULE (§ 73.658(k) OF THE COMMISSION'S RULES) BY NATIONAL BROADCASTING COMPANY, INC., FOR A MAJOR LEAGUE BASEBALL PREGAME SHOW

MEMORANDUM OPINION AND ORDER

(Adopted March 25, 1974; Released March 26, 1974)

BY THE COMMISSION:

1. The Commission here considers a request for waiver of the prime time access rule (§ 73.658(k) of the Commission's Rules) filed on February 28, 1974 by National Broadcasting Company, Inc. (NBC) to permit stations commonly owned by or affiliated with NBC to carry a regular season major league baseball pre-game show beginning at 7:30 p.m. E.T. in addition to the game itself, commencing at approximately 8:00 p.m. E.T. The prime time access rule currently limits the amount of network programming to three hours each evening.

2. The circumstances which prompt this request are somewhat unusual in that the pre-game show to be presented is a ceremony in honor of Hank Aaron, a player with the Atlanta Braves who will be making his first major league appearance of the year in a game to be played at Atlanta on Monday night, April 8, 1974. Mr. Aaron, whose career record of 713 home runs (one behind Babe Ruth, who holds the all-time record) is to be honored in a ceremony commencing at 7:30 p.m. E.T. which will include the participation of a number of public and civic leaders. NBC asks that the prime time access rule be waived in order that it may present live coverage of these ceremonies as a pre-game show before the game beginning at approximately 8:00 p.m. E.T., followed by as complete coverage of the baseball game between the Atlanta Braves and the Los Angeles Dodgers.

3. NBC argues that the unusual circumstances provide the basis upon which this waiver should be granted, and that the Commission has previously granted waivers for pre-game programs beginning at 7:30 p.m. E.T. for other baseball games.[1] NBC further states that the coverage contemplated here could be deemed to be coverage of a fast-breaking news event, and therefore entitled to the exemption for such

[1] *Requests by the Three National Television Networks (Sports Events)*, 32 FCC 2d 58 (1971); *Request of National Broadcasting Company, Inc. (Baseball)*, 35 FCC 2d 934 (1972); and *Various Requests for Waiver*, 41 FCC 2d 627 (1973).

news broadcasts.[2] A definitive ruling as to this question is not sought, and we do not rule on it here.

DISCUSSION AND CONCLUSIONS

4. Upon careful consideration of the foregoing, we are of the opinion that the requested waiver should be granted. We agree that while this is a regular season game (the previous waivers for pre-game shows were granted for All Star and World Series games), the circumstances are sufficiently different from the usual regular season game that NBC should be permitted to present live coverage of the pre-game ceremonies honoring Mr. Aaron. We hasten to add, however, that our decision here is limited to the circumstances presented by this request, and that this is not to be interpreted as in any way encouraging further requests for similar waivers for pre-game shows which encroach on access time in the Eastern and Central time zones.

5. Accordingly, IT IS ORDERED, That the request by National Broadcasting Company, Inc. (NBC) filed February 28, 1974, IS GRANTED, in order that stations commonly owned by or affiliated with NBC MAY PRESENT a pre-game show commencing no earlier than 7:30 p.m. E.T. in addition to regular coverage of a major league baseball game on Monday evening, April 8, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[2] § 73.658(k)(2) of the Commission's Rules.

FCC 74-279

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
SCOTT BROADCASTING CO., INC.
Concerning Contest Conducted by Station
WTRY, Troy, N.Y.

MARCH 14, 1974.

SCOTT BROADCASTING CO., INC., OF NEW YORK
Radio Station WTRY,
92 Fourth Street,
Troy, N.Y.

GENTLEMEN: This is with reference to the motorcycle contest conducted by Station WTRY.

It appears from the information you have furnished the Commission that the contest was conducted during March and April, 1973 and that the prizes were two Japanese motorcycles, one for a female and one for a male winner. The motorcycles were shipped by land from Akashi to Kobe in Japan, by sea from Kobe to Newark, New Jersey and thence by land to your studios in Troy. From time to time while the shipment was en route you broadcast information about its location. Contestants were required to make a listing of the various locations you described and to submit it together with a calculation of the total mileage from Akashi to Troy.

Your official basis for judging mileage entries was a letter from the import manager of Kawasaki Motors giving three mileage figures: Akashi-Kobe, Kobe-Newark and Newark-Troy, with no indication whether the sea mileage (Kobe-Newark) was in nautical or statute miles. You state that your announcers were instructed to ad lib the requirement that entries be submitted in statute or land miles and that you so informed complainants and others when they inquired on this point.

In preparing your first judging of the contest you assumed that the Kawasaki letter sea mileage figure was in statute rather than in nautical miles and you derived a standard for judging by simply adding the three mileage figures instead of first converting the Kobe-Newark figure to statute miles. You made no effort to confirm the validity of this procedure until after you had received the Commission's first letter of inquiry. You then learned that the sea mileage figure from Kawasaki Motors was in nautical miles. But meanwhile you had already judged the contest and had awarded the motorcycles to Ms. Karlyn Stanley and Mr. Eugene Nailor.

After learning that the Kawasaki letter sea mileage figure was in nautical miles you made a new mileage calculation, decided that you would not request Ms. Stanley and Mr. Nailor to return their prizes and judged the contest a second time, declaring Mrs. Gloria J. Nelsen and Mr. Gary LaGrange to be winners.

You have informed the Commission that your announcers were instructed to ad lib the rule that contestants spell place names correctly in their entries. Hand-written notations appended to announcers' scripts you have furnished the Commission indicate that incorrect information for spelling of the Ogasawara Islands (one of the ship's announced locations) may have been broadcast, since the notations misspell the word and supply incorrect information as to its pronunciation. Another such notation spells Hawaiian as "Hawaiin." Copies of the Stanley and Nailor entries indicate that Mrs. Stanley did not list the broadcast place names Akashi and Kobe, incorrectly stated that the ship sailed from Tokyo and identified Cocos Island with the Republic of Costa Rica. Mr. Nailor made a half dozen spelling errors, e.g., Ogashawaru or Ogashawarn (which is not clear) for Ogasawara, Hawaiin for Hawaiian, Cann or Canu in the second of two references to the Panama Canal, Jamica for Jamaica, and Jacksonvill for Jacksonville.

A third round of judging occurred when you learned that Mrs. Nelsen's entry was in error in locating a point east of Jacksonville, Florida in the Pacific Ocean. You reversed your decision to award Mrs. Nelsen a prize, rejected her entry and declared Ms. Denise LaGrange winner of the fourth motorcycle.

The Commission has stated that any contests broadcast by a station should be conducted fairly and substantially as represented to the public and that a failure to do so falls short of the degree of responsibility expected of licensees, *KOLOB Broadcasting Co.*, 36 FCC 2d 586 (1972). Here the president of the licensee has himself expressed to the Commission his "disappointment" in the performance of the station in the motorcycle contest. The information as summarized above indicates that there was general failure properly to plan, organize and conduct the contest; that initially you failed to inform yourself as to the proper basis for judging the mileage submissions, and that some entries were not judged in accordance with your rules for the listing and spelling of locations. The Commission believes, therefore, that you have not exercised the degree of responsibility expected of you and admonishes you for this shortcoming.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 73-1180

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
STARR BROADCASTING GROUP, INC.
Concerning Transfer of Control of Station WBLG-TV, Lexington, Ky.

NOVEMBER 14, 1973.

Mr. PETER H. STARR,
President, Starr Broadcasting Group, Inc.,
1000 Howard Avenue,
New Orleans, La.

DEAR MR. STARR: This refers to your application for acquisition of control of WBLG-TV, Inc., licensee of Station WBLG-TV, Lexington, Kentucky, from Roy B. White, Jr. and Reeves Telecom Corporation (BTC-7172).

Section 310(a) of the Communications Act of 1934, as amended, provides in pertinent part that a station license,

"... shall not be granted to or held by ... any corporation directly or indirectly controlled by any other corporation ... of which more than one-fourth of the capital stock is owned of record or voted ... by aliens ... if the Commission finds that the public interest will be served by the refusal or the revocation of such license."

In the most recent citizenship showing for Starr Broadcasting, filed on March 22, 1971, you stated as follows:

Questionnaires were sent to all stockholders of record as of December 10, 1970. Holders of 70% of all outstanding shares have responded, as follows:
Total shares outstanding—496,262
Total shares responding 343,563 (70%)
Of the 343,563 shares responding, (93%) (320,563 shares) reported U.S. Citizenship; only 7% (23,000) reported non-U.S. citizenship—including holdings in street, broker and nominee names, as well as individual holdings.
82,915 of the 343,563 shares responding were reported as holdings of brokers; all such shares were reported as held for U.S. citizens.

In the above quoted report you have shown that approximately 65% of your outstanding stock is held by United States citizens and that 23,000 shares or approximately 5% of your outstanding stock is held by aliens. The citizenship of holders of 30% of your outstanding shares has not been established. As reported in the Form 323 Ownership Reports for Starr, all of its officers and directors are U.S. citizens. In connection with the processing of the instant application, your communications counsel has informally advised the staff of the Commission's Transfer Branch that you are presently in the process of preparing a complete citizenship showing which will be filed by the end

of this year. In these circumstances, since all of Starr's officers and directors are U.S. citizens and since Starr, through its wholly owned subsidiaries, is a multiple owner of broadcast facilities whose basic qualifications are a matter of record—rather than a new entry into broadcasting, the Commission has concluded that the public interest will be served by a grant of the instant application, subject to the following condition:

That Starr file an up-to-date citizenship showing by March 1, 1974, and that this action is without prejudice to any action the Commission may take as a result of such further citizenship showing.

In connection with your forthcoming citizenship showing, it should be noted that where the stock of a licensee or its parent is widely held, a statistically valid sampling may be relied upon to show the citizenship of holders of less than 1% of the outstanding stock.

Accordingly, upon determining that the public interest, convenience and necessity would be served thereby, the Commission has this day granted your application subject to the condition set forth above.

Chairman Burch; Commissioners H. Rex Lee, Wiley and Hooks concurring in the results.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 73–1181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
WBLG–TV, INC.
Concerning Transfer of Control of Station WBLG–TV, Lexington, Ky.

NOVEMBER 14, 1973.

MR. GLENN CARR,
1613 Atlanta Drive,
Lexington, Ky.

DEAR MR. CARR: This is with reference to your letter dated June 7, 1973, regarding the application for Commission consent to the voluntary transfer of control of WBLG–TV, Inc., licensee of television Station WBLG–TV, Lexington, Kentucky from Roy B. White, Jr., and Reeves Telecom Corp. to Starr Broadcasting Group, Inc. (File No. BTC–7172).

You allege in your letter that Commission approval of the subject transfer of control application will give Starr "potential media concentration in southeastern Kentucky" due to its common ownership of television Stations WCYB–TV, Bristol, Virginia and WBLG–TV. You state that "friends in the television industry" have related to you "that six counties with nearly 30,000 television homes view television from both Lexington and Bristol." Additionally, you allege that four counties with nearly 16,000 TV homes "have significant viewing" of both stations.

Stations WBLG–TV and WCYB–TV are 160 miles apart and neither their Grade A nor Grade B contours overlap. Our records show that at the closest point, 20 miles separates the Grade B contours of WBLG–TV and WCYB–TV. Under these circumstances, it could be quite possible that some TV households view both stations as you allege. Our multiple ownership rules (Section 73.636 of the Commission's Rules) prohibit the ownership of more than seven television stations, the ownership of two television stations whose Grade B contours overlap, or the ownership of fewer than seven television stations if that would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest. Here, transferee is acquiring its third television station and there is no prohibited Grade B overlap. With respect to your allegation of media concentration, acquisition of WBLG–TV by Starr will result in no undue concentration of control of mass media contrary to the public interest because of the existence of other competing media in the area.

Listeners residing within the Grade A contour of WBLG–TV are able to receive off-the-air signals from eight television stations and over 16,700 homes receive television signals from five area CATV systems. Additionally, three AM and four FM radio stations are licensed to Lexington, Kentucky. Within the Grade B contour of WCYB–TV, listeners receive off-the-air signals from three television stations and over 25,000 homes receive television signals from seven CATV systems. Additionally, this Grade A area contains 18 AM and 9 FM radio stations. Those persons residing within WCYB–TV's Grade B contour view four additional television stations and 2500 additional homes are wired to two CATV systems. Also providing competition for WBLG–TV and WCYB–TV are area newspapers: Lexington itself is served by two dailies with circulation of over 85,000 and a Saturday and Sunday editions with circulation over 78,000. Within the Grade B contour of WCYB–TV the following newspapers are published: five weeklies have total circulation of over 25,000; seven dailies with circulation over 90,000; four Sunday editions with circulation just under 100,000; and one three-day-a-week publication having a circulation of over 7,000. Given the existence of these other competing media in both markets and the distance that separates the two television stations, the Commission is not persuaded that a grant of the subject application will result in an undue concentration of control of mass media.

Therefore, your informal complaint has been dismissed as failing to raise substantial or material questions of fact that would indicate that a grant of the subject application would be contrary to the public interest. Accordingly, upon determining that the public interest, convenience and necessity would be served thereby, the subject application to transfer control of WBLG–TV, Inc., licensee of television Station WBLG–TV, Lexington, Kentucky, from Roy B. White, Jr. and Reeves Telecom Corp. to Starr Broadcasting Group, Inc., has this day been granted.

Chairman Burch, Commissioners H. Rex Lee, Wiley and Hooks concurring in the results.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*